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THE MODERN LAW of PARTNERSHIP

INCLUDING A FULL CONSIDERATION OF
JOINT ADVENTURES, LIMITED PARTNERSHIPS, AND JOINT STOCK COMPANIES, TOGETHER WITH A TREATMENT OF THE UNIFORM PARTNERSHIP ACT

By
SCOTT TROWLEY
OF THE TOLEDO, OHIO, BAR
ASSISTED BY THE PUBLISHERS' EDITORIAL STAFF

IN TWO VOLUMES
VOLUME I

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TO MY BROTHER,

JUDGE ARTHUR E. ROWLEY,

THESE VOLUMES ARE DEDICATED IN RECOGNITION OF

HIS HIGH STANDING AS A CITIZEN,

LAWYER AND JURIST.

PREFACE

No complete separate text on the Law of Partnership has been published for many years. During that time there have been great developments in the law bearing on the subject; most conspicuous among which may be mentioned the recent drafting of the Uniform Partnership Act by the Commissioners on Uniform State Laws and the adoption of that act by the legislatures of some of the states.

The father of classified Partnership Law, Mr. Justice Lindley, produced many years ago, a work which, from the standpoint of merit, will probably never be surpassed, and which has, to a large extent, been followed in outline by later writers on the subject. It has seemed to the author of this work, however, that changes in the law call for a new and distinctive classification, in many particulars, and he has endeavored to meet this need by changing the old classification when he thought it advisable, and adopting it where conditions have not required a change, and incorporating therein the newer and prevailing law.

All the authorities have been thoroughly examined. Where there are conflicting rules, the reasons for each have been discussed. Full space has been given to the reasoning upon which most of the rules are based, for it is thought that a text of this character is of much greater value than one which merely states the rules. The Uniform Partnership Act, which is bound to be of great importance to the practitioner, has been treated in all its separate provisions, under the appropriate headings in the outline, and each of its provisions compared with the present holdings of the cases upon that particular phase of the law. A complete set of partnership forms has been compiled. The aim has been to make a modern work on the subject, treating all its phases, whereby the practicing lawyer may not only secure a full treatment in the text, but will also be enabled from the citations to make a thorough selection of cases from his own and other states.

The author rests under a deep sense of obligation to Mr. Aurelius Gale Pheasant and the publishers' editorial staff for the great assistance they have rendered him in the preparation of these volumes. The high character and usefulness of these services are gratefully and unreservedly acknowledged by the author.

SCOTT ROWLEY.

Toledo, Ohio, April 15, 1916.

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THE LAW OF PARTNERSHIP

CHAPTER I

INTRODUCTORY AND HISTORICAL

SECTION

1. Earliest partnerships.
2. Babylonian law.
3. Jewish law.
4. Roman law.
5. Chinese law.
6. Partnership and the law merchant.
7. Early English law.
8. Later developments in English law.
9. Codification.
10. American Uniform Partnership Act.
11. Scope of Uniform Partnership Act.
12. General view of Uniform Partnership Act and changes made by it in existing partnership law.
13. Uniform Partnership Act as considered in succeeding chapters.

§ 1. **Earliest partnerships.**—Partnerships have existed from the earliest times. Sharing profits in a common business undertaking is the most distinctive feature of partnership. The first man and the first woman, thrown together among primeval conditions, joining forces against the elements and the dangers without, and the pangs of hunger within, and giving mutual protection and assistance, each to the other, typify the earliest form of partnership. They associated their skill and labor and made their home secure from the beasts of prey that infested the forests about. The primitive furnishings of their abode, the crude weapons of offense and defense, the stores of nuts and fruits hidden in their cave home, all were produced and assembled by their common efforts and for their common benefit. When their

efforts succeeded, there was their profit—the finished product. In case of a failure, they shared the loss—their labor and time expended. The first partnerships were necessarily of the rudest sort, and the common undertakings were of a simple character with no laws governing the subject, except the law of the strongest arm, the quickest eye, and the heaviest club. As the population of the earth increased and government became better established, the various phases of the subject now known to us were evolved and gave rise to a separate system of laws with special adaptation to this relation. Many of these laws are now outgrown and obsolete, but there is a tendency toward a broader view of the subject, and such construction of the laws as will meet the changing conditions of a commercial age of larger organizations.

§ 2. **Babylonian law.**—Approximately 2300 B. C.—almost a thousand years before the Mosaic law was given to the Jews, Khammurabi, King of Babylon, and one of the greatest law-givers of history, compiled a system of laws in the famous code which bears his name. This is perhaps the first code which definitely recognizes and regulates the relation of partnership; not, it is true, in all respects as we now understand the relation, but, nevertheless, sufficient to give a definite standing to the subject. The principal occupations of the Babylonians were agriculture and commerce, and it is chiefly to these pursuits that the laws were directed. Commercial partnerships were, at that time, chiefly for single transactions, and we have record of one of these transactions, illustrating the application of the then existing customs and laws. "Adad-iddinam and Arad Martu made a partnership and went to Sippura, and in the gate of the Sun-god they returned the property and the capital they invested, and each took as much as he was entitled to and went his way." Under the agricultural laws, in Section 46, this rule is established: "If his (the landlord's) rent he has not received, and has given his field for a half or a third, the corn which is in the field, the farmer and the owner of the field shall divide according to the terms of the contract." Under this code, the likeness to our pres-

ent laws is emphasized, by the joint sharing, to a certain extent at least, of profit and loss. Section 46, above quoted, shows a division of profit, at least of gross profit, if we may here so use the term. Section 48 of the code provides for division of the loss, in case of failure of the crop for certain specific reasons. There are certain rules of our present law as to profit and loss, which are not completely covered or included in the above code, but the similarity, in a general way, is clearly seen. In the Babylonian year book, further rules are given in detail, as follows: "If a farmer takes for a half-partnership, everything is equal—man as man—house as house—seed as seed." "When harvest time comes, the master sends from his place an ox for threshing the corn, and the corn of the field he takes." These rules, like our court decisions, further illustrate the code, and they show an even closer approach to present laws than the code itself. The following form of Babylonian contract of partnership may perhaps prove to be of interest. "Four feddan, a field within the field of the Sun-god, the field Arad-ulmas-sittum, son of Taribum, from Arad-ulmas-sittum, the master of the field, Arad-ulmus and Anul-adad, sons of Usatim, this field for cultivation on rent for one year have hired; one with the other an agreement has been established. In the day of harvest they shall reap as right and left [equally] the corn, the rent of the field they shall pay, the agreement they shall close, the property jointly they shall possess. [Date] 22nd day, month Sukul, year of Ammiditana, the King." From a study of the whole code, and of the rules in the year books, we find that the Babylonians had three systems of letting land—(1) by a relation of partnership—(2) by land hired and rent paid in kind—(3) by farmers who did the work and received both a wage and a certain portion of the produce. Thus we see that the Babylonian partnership, both commercial and agricultural, approached, in the main, the modern partnership, and was, in part, the forerunner and perhaps even the model from which the modern form of this branch of the law was evolved, and that, in over four thousand years, the basic rules of this subject have been changed or modified but little.

§ 3. **Jewish law.**—The ancient Jews were a pastoral and not a commercial people. Their earliest form of partnership related to the holding of land. The word "shutolin" was first used in reference to the joint ownership of land, but later the word, as changed and modified, was applied to partnership, and the relations growing therefrom. In case the contribution of both partners was to be money, it did not become partnership property until both partners had put the money in a common bag, and both partners had lifted it. As to other property brought into the partnership, other technical rules were provided. There was one advantage in their system, however, in that there was little if any chance for a dispute between the partners or third parties as to whether or not a partnership existed, since there was proof at hand in case there should be a dispute. There was a sharing of both profit and loss between the partners, and the division of the profit or loss, in the absence of a special agreement, was in equal proportions. The partners, as a rule, had the power each to bind the other by contract. One peculiar feature of the ancient Jewish partnership, however, was the absence of any firm name. In this particular, it approached the feature of joint ownership of land, and the development of joint land ownership under Jewish law into partnership probably explains this peculiarity. Another peculiar feature was found in the association of capital and labor. The question of usury was injected, and it was held that in order to avoid the taint of usury in such an association the capitalist must pay wages to the business man, and a different manner of division of profits and loss was evolved in this case. The union of law and religion under ancient systems of jurisprudence is well illustrated by the Jewish law governing partnerships. A Jew and an unbeliever could not form a partnership, as it was said that in case of dispute the unbeliever would, in giving his oath, swear by another than by the Jewish God. A great part of Jewish commerce and consequently of Jewish partnership of advanced periods, grew out of the caravans of ancient times. These caravans were in constant danger from the Bedouins of the desert, and the rule grew up that if one partner

could save the caravan from the robbers, and his partners could not so save it, he saved it for himself alone, and not for the partnership; but if the partners could so save it, he who saved it did so for the benefit of all. This would seem a dangerous rule to establish, as it would encourage a dishonest partner to secure men to attack the caravan, and then save it himself, by working in collusion with them. A study of these ancient laws shows that the same general rules prevailed at the time here discussed as we now enjoy; that in fact our present partnership law but embodies the theory established in several of the old nations, the Jews included, with a few changes, additions, or omissions in places to conform to modern conditions. These brief statements demonstrate the genius of the old commercial nations in dealing with the subject, the adaptability of the subject to varying conditions, and the pressing need of the relation in carrying on the commerce of any nation.

§ 4. **Roman law.**—It is commonly thought that the Roman law had but little influence upon the English law, and, consequently, upon American law, except in those states where the French prevailed and gave a civil-law tone to the legal system. Investigation will, however, show the fallacy of this conception, and it is perhaps nowhere better shown than in the law of partnership. In the system growing out of the code of Justinian, we find that with a few changes, it could almost be taken as a code of American partnership law of to-day. Partnership, as defined by a noted writer on Roman law, is: "A contract by which two or more persons agree to combine their property or labor, or both, on the condition of sharing the common profit and loss."[1] The same theory of profit and loss which prevails in our law to-day is present. If nothing is stipulated as to the share of each partner in profits or losses, the presumption is that each shares equally, but the contract could provide for a different division. Partnership could be either general or special, according to the provisions of the contract. General partnerships are divided into

[1] Morey's Outlines of Roman Law, p. 368.

two classes, in which the partners either placed (1) all their property, time, and efforts in a common ownership, or else (2) so held their efforts and services in and relating to some professional or business association only, without including ventures in other matters. The special partnership was also divided into two classifications: (1) One formed for a single purpose or transaction and (2) one to hold in common some particular thing. As to dissolution of the Roman partnership, and as to the usual rules as to rights and duties inter se, and other partnership matters, the law was very similar to our own. There was, however, one very great exception to the similarity of the Roman law to modern law; as to third persons, there was no implied agency of one partner for the other, and only the partner transacting the business with the third person was liable.

§ 5. **Chinese law.**—The jurisprudence of China though different in many particulars from that of the western nations contains many similar principles in its laws relating to partnerships. As a rule, only the active members of the partnership are held liable indefinitely as to amount, while the other members are held only to the amount of their capital. In case of a joint stock company, only the directors are liable personally. All the stockholders who were not directors are only liable for the value of their stock. The family, in China, is the unit for many purposes, and property is often held by a whole family in common. In case a member of a family should be an active partner in a bankrupt concern, in general the interest of the partner in the family property could be taken on the partnership liability. It will be seen that a common Chinese partnership partakes of the nature of our limited partnerships. It is, however, perhaps safe to say that even in China the great features of the law of partnership closely resemble our own laws.

§ 6. **Partnership and the law merchant.**[2]—During the Middle Ages, in its periods of great commercial activity, partner-

[2] See Mitchell, Early Forms of American Partnership, Select Essays in Anglo-Legal History, Vol. III, p. 183.

ships were very common. It seems that there were two general forms, one of which was the "commenda," in which one partner furnished the capital, and the other conducted the business. The commendator, as the partner was called who furnished the capital, usually took the risk of loss, and received the greater share in the profits. The managing partner was called the tractator. The commenda shows the earliest form of dormant partnership and limited liability. Another form of partnership at this time was the "societas" or "compagnia," in which the partners were associated together with equal rights, and were liable individually for the debts of the society, and had power to bind their fellows in contract. Such organizations usually did business in the name of one member with the addition of the term "et socii," which seems to have been the origin of the firm name. At first, resort was had to general notoriety or the books of the firm in order to determine who were liable as partners, but later it was required that the names of partners be registered with certain guilds, and with city authorities, and that dissolution be made by a public instrument. It seems that at first one partner could not bind the others without special authority, but later the power of one partner to bind the others was recognized by implication, perhaps because in most instances he was specially authorized to do so. The principle of unlimited liability for the debts of the firm seems also to have been one of gradual growth. The nature of the commenda and the societas, as has been seen, was very different. They had a different origin and purpose, the first being a speculative transaction, the second usually a permanent association of persons having confidence in each other to carry on business together, and the liabilities were different. But it is probable that the beginnings of partnership in England came directly from these Italian societies. The merchants of the Mediterranean traded in England, and their liability would be governed by the laws of their associations. English merchants in their associations followed largely the plan of organization adopted by the Italians, and in fact the greater part of partnership law is an outgrowth from mercantile customs. The

joint stock company, or partnership in which shares could be freely sold, which is also in a way the predecessor of the modern corporation, likewise had its origin with the Italian merchants of the middle ages, and this form of organization was greatly used in business relationships to engage in trade with colonies which were at that time being established by the leading European nations. There are examples of the first two forms of partnership in the thirteenth century or earlier, and gradually they developed until they reached their full importance about the sixteenth and seventeenth centuries. The third form seems to have been of later origin. The partnership law of the continental nations of Europe has as its basis the Roman or civil law, modified by the Law Merchant. It seems that the law of partnership in all modern nations not English-speaking, is a combination of the civil and mercantile law, while in English-speaking nations it is the combination of common law and mercantile law.

§ 7. **Early English law.**—There are no partnership cases in the English reports until well into the seventeenth century. The earliest cases involved the right to an accounting and to survivorship. Blackstone makes very little mention of partnership, and that little refers to equity taking concurrent jurisdiction in the matter of accounts of all partnership dealings,[3] and to the doctrine that "stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein."[4] The reason seems to be that all earlier questions connected with the relation were settled under the law merchant in the courts of the merchants, or staple courts. In those days the merchants desired speedier justice than could be accomplished in the courts of law, and to this end established somewhat informal courts of their own, which were open at all times and decided submitted questions without delay. Then the statute

[3] 3 Bl. Com. 437, citing 1 Eq. Cas. Abr. 367.

[4] 2 Bl. Com. 399, citing 1 Vern. 217 and Co. Litt. 182.

of the Staple, 2 Edw. III, Statute 2, was passed in 1353, which recognized that merchants may not often long tarry in one place for levying of their merchandise, and promised them speedy right from day to day and from hour to hour, according to the laws used in such staples before such time, and created mayors and constables of the staple who were elected by the merchants of each merchant town. From the law merchant have come the right of one partner to have an accounting from the other, and the doctrine of non-survivorship, which distinguish the rights of partners in partnership property from the rights of joint tenants at common law.[5]

§ 8. Later developments in English law.—The earliest cases in the English law reports dealing with partnership had to do with a partner's right to an accounting,[6] or denied the right of survivorship on the death of one of two partners.[7] The first treatise in English on the subject of partnership was written by Watson, and published near the close of the seventeenth century. In the earlier years of the nineteenth century the partnership was the most important form of association of persons together for the doing of business, and at that time the greater number of the basic principles of partnership law became well settled. Many texts on the subject were written, among which may be mentioned those of Story, Collyer, and Parsons, which had a strong influence in shaping the trend of subsequent decisions. In 1860 was published the first edition of Lindley on Partnership, and this text with its many subsequent revisions has since been the standard text in England,

[5] See What Is the Law Merchant, by Francis M. Burdick, 2 Columbia Law Rev. 470, citing Bracton De Legibus Anglicæ, l. v. f. 334a, l. vi. 444a; Pollock and Maitland's History of English Law, Vol. 2, p. 212; Clermont's Fortescue, pp. 120, 121; Coke 4th Inst. 272; 27 Edw. III, Stat. 2; Zouch Jurisdiction of Admiralty, p. 128.

[6] Y. B. 30 Edw. I, Account 127; Y. B. 38 Edw. III Account 7; Fitzherbert Nat. Brev. Account 267 (D).

[7] Hamond v. Jethro, 2 Brownl. & G. 97n; Jeffereys v. Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424. See also Bellasis v. Hester, 1 Ld. Raym. 280.

and has been of large influence in America. In the latter years of the nineteenth century and the first years of the present, the trend in business organization was almost entirely toward the corporation with its artificial personality and limited liability, and the partnership, which at one time had this field entirely to itself, became of secondary consideration in the minds of most persons. Recently, with the increasing stringency of statutory regulation of corporate action, there has been a tendency to return to the partnership as a form of association of persons in business.

§ 9. Codification.—The most conspicuous development in the history of partnership law within the last generation has been in the direction of codification. In 1890 the English Partnership Act was passed. This was not intended to be the enactment of new law, but rather a codification of the existing law on the subject, as found in the decisions. Mr. Lindley says of this act:[8] "This act is not a complete code of partnership law; the mode of administering partnership assets in the event of death or bankruptcy is not to be found in it, neither is there anything in it relating to good will. The Act itself provides by Section 46 that existing rules of equity and of common law shall continue in force except so far as they are inconsistent with the express provisions of the act. Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory; but it does not follow that such a work is not worth executing; if it is well done as far as it goes, it may be a great boon; and the Partnership Act, 1890, although imperfect, has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed and as carefully considered as any Act of Parliament is likely to be. * * * With one important exception the Partnership Act, 1890, introduced no great change

[8] Lindley Partnership (8 ed.), p. 2.

in the law. It amended the law in some small particulars, and it removed doubts on one or two controverted points; but, speaking generally, the Act made no important change in the law save in respect of the mode of making a partner's share of the partnership assets available for the payment of his separate judgment debts."

§ 10. **The American Uniform Partnership Act.**—In several American states the partnership law has been codified. This is true in Louisiana, which follows the civil law, in California and other western states, including Montana, North Dakota, South Dakota and Oklahoma, which have practically adopted the California code. In New York, Ohio and some other states portions of the partnership law have been codified, and in all jurisdictions limited partnerships are governed by a statutory code. The Conference of Commissioners on Uniform State Laws is a body of men whose aim and work has been "to express in legislative form, clarify, simplify and make uniform our commercial law."[9] This body prepared the Negotiable Instruments Act, which was adopted by the conference in 1896, and since that time has been adopted by almost every state in the union. This conference has also prepared several other uniform acts on subjects of commercial law. Perceiving certain advantages in a uniform codification of the partnership law in the various states, the conference was engaged for several years in preparing such an act. In its final shape the act was drafted by Professor William Draper Lewis, was adopted by the Conference on Uniform State Laws in October, 1914, and has since been enacted into law by some of the state legislatures.[10] Other well-known authorities on partnership law who took part in the consideration of the act were Dr. Floyd R. Mechem, Dr. Francis M. Burdick, and Dr. Samuel Williston. The reasons advanced in favor of such codification may probably be best expressed in the words of Dr. Samuel Williston, one of

[9] William Draper Lewis, 24 Yale Law Journal 617.

[10] Act July 6, 1915, ch. 358, Wisconsin Laws 1915; Act March 26, 1915, Act No. 15, Pennsylvania Laws 1915.

the Commissioners on Uniform State Laws.[11] "Codification has an ugly sound to most American lawyers. We have been trained to believe that no code can be expressed with sufficient exactness, or can be sufficiently elastic to fulfil adequately the functions of our common law. The iridescent legal utopia proposed by Bentham and his followers, in which every one should readily know the law, or be able quickly to find it by turning to a code, and in which the professional lawyer would be abolished, has been proved a dream. We know, to-day, that law must adapt itself to changing conditions; that what is right in one time and place is not necessarily universal truth; that so long as the skein of human affairs is full of difficult tangles the law controlling those affairs can not be simple, or understood easily by uninstructed persons; that much of our law is in too vague a form to be written down; that new cases may arise to-morrow for which the common law will find an answer—though neither the question nor the answer could be suggested by one who framed a code to-day. * * * It must not be forgotten, however, in any criticism of codification, that practically the whole civilized world, except English-speaking countries, is governed by codes; that these codes have been adopted chiefly during the past century after trial of systems of unwritten or customary law and that foreign expert opinion seems practically unanimous in favor of codification. We are, therefore, driven to believe that there is nothing chimerical in the plan of codification itself, but that if it has serious disadvantages in English-speaking countries they must be due either to (1) the inferior workmanship of the codes which have actually been produced, or (2) to the greater vagueness or rapidity of the growth of the law of English-speaking countries which makes adequate codification impracticable. The first of these evils should be remediable if time, patience, hard work, and learning, can be combined to meet them. The second objection, if applicable to parts of our law, can not be true of many other parts, including such

[11] 63 University of Pennsylvania Law Rev., p. 196.

parts of the commercial law as the Commissioners on Uniform State Laws have attempted to codify. The law of these subjects is in the main crystallized and indeed, is so far fixed in its main points by numerous judicial decisions that it is practically impossible to change it without legislation. * * * A difficulty in regard to even partial codification which troubles many is the lack of elasticity which statute law has as compared with the common law. That this objection is wholly without force need not be contended, but it may easily be over-emphasized in regard to such codification of such matters as are here under discussion. The main principles of these subjects have already become inelastic in the common law. They could no more easily be changed than could a statute itself, except by legislation. What may be called the fringe of the subject is doubtless open to possible development and growth at common law, but this possibility still remains for all the uniform statutes provide that as to matters not specifically covered by the act, the rules of common law and equity are applicable." Upon this point Dr. William Draper Lewis says,[12] "In expressing in legislative form our commercial and business association law, the Commissioners, if their work is well done, are creating that which will probably long outlast the present generation. The Uniform Negotiable Instruments Act, for instance, which was the first act sanctioned by the Conference, would have been equally applicable to commercial conditions in the early eighteenth century, and with comparatively slight modifications, could have been adapted to conditions in classic Rome. Again, in spite of recent great industrial changes, the Uniform Partnership Act would have met conditions in Lord Mansfield's day as well as those of to-day. As these two acts would have worked as well in 1765 as in 1915, there may be a reasonable expectation that they will meet conditions of one hundred and fifty years hence." Dr. Williston continues to enumerate the advantages of codification as follows: "1. To produce uniformity of law. 2. To state the law in a compendious form in which it will be susceptible

[12] 24 Yale Law Journal 618.

of easier reference and more exact determination than if sought from decisions. 3. To settle uncertain questions of law without litigation. Legislation is cheaper than litigation as a means of fixing the law in these particulars. In the newer states this advantage is entitled to the greatest weight. 4. To harmonize into a more consistent whole a body of doctrines, many of which have grown up, if not at haphazard, at least without particular reference to one another."[13]

§ 11. **Scope of Uniform Partnership Act.**—The Uniform Partnership Act, like the English Partnership Act, is not a complete codification, in every respect, of the law relating to partnership. It is declared that in any case not provided for in the act the rules of law and equity, including the law merchant, shall govern.

There are some features connected with partnership law, which are not mentioned in the Act. Nothing is said as to whether the partnership can sue in the firm name, or the partners must sue. The Commissioners probably judged it unwise to put any provisions of this kind in the act, lest there should be a conflict with the civil code provisions of some of the states. Few specific rules touching bankruptcy of a partnership are laid down. These, however, are cared for in the Federal Bankruptcy Act. There are no specific provisions touching the subject of fraudulent conveyances, though the provision which makes a firm continuing the business after retirement or admission of a partner liable to the creditors of the old firm will obviate much of the prior confusion as to whether conveyances of partnership property were in fraud of creditors. The Act as once drafted contained a section on fraudulent conveyances, but the commissioners later concluded that it would be better to draft a uniform law on the subject of fraudulent conveyances.[14]

§ 12. **General view of Uniform Partnership Act, and changes made by it in existing law.**—There are six parts in

[13] 63 U. P. Law Rev. 199.

[14] William Draper Lewis, 29 Harvard Law Rev. 297.

the Uniform Partnership Act. Of these, the first, Sections 1-6, is taken up with preliminary provisions, including definitions, rules for the construction of the statute and provisions that the law of estoppel and agency shall apply under the act and that the rules of law and equity shall govern a case not provided for in the act. The second part, Sections 6-8, deals with the nature of a partnership, defines it, and prescribes tests for determining whether a partnership exists, and what is partnership property. The third part, Sections 9-17, is concerned with the relations of partners to persons dealing with the partnership. The specific subjects are the agency of the partner for the partnership in the business, the conveyance of real property of the partnership, the binding of a partnership by a partner's admission, wrongful act or breach of trust, the nature of a partner's liability, the liability of an incoming partner and partnership liability by estoppel. This portion of the act makes several changes in the rules now recognized by many, if not most jurisdictions. It provides for the conveyance of real property in the partnership name, makes an incoming partner liable for the debts of the firm previously contracted, and makes some changes in partnership liability by estoppel, providing that no one can be charged because he has been held out as a partner unless he has consented to it, and that if there is no actual partnership, persons held out as partners may be jointly liable. The fourth part, Sections 18-23, deals with the relations of partners to one another, specifically treating of the rights and duties of the partners. There are probably no rules laid down in these sections which have not the support of American decisions, although Section 18 allows a surviving partner reasonable compensation for winding up the business, which is contrary to the commonly accepted rule. Section 21 makes a partner liable as trustee for secret profits. The fifth part, Sections 24-28, has to do with the property rights of a partner, and specifically considers the extent of such rights, the nature of a partner's right in specific partnership property, the nature of his interest in a partnership, the assignment of such interest and the subjection

of such interest to a charging order. Section 25, while probably not changing greatly the general rules as to a partner's rights in specific partnership property, creates a new name for the character of his holding, that of tenancy in partnership. It also provides that a partner can not assign his interest in particular partnership property, and that such interest is not subject to attachment by his separate creditor. Section 28 is an innovation in partnership law, in this country, though taken from the English act, and it provides for the issuance of a charging order on the interest of one partner, at the suit of a judgment creditor, which will take the place of attachment of a partner's interest by an individual partner, this being forbidden by Section 25. Section 26 definitely states that a partner's interest in the partnership is personal property, thus adopting the English rule of equitable conversion for all purposes, in contra-distinction to the general American rule, and doing away with the rule in some decisions that his share in partnership lands is real estate, and descends to his heirs. The sixth part, Sections 29-41, is entitled Dissolution and Winding Up, and contains about half the printed matter of the entire act. It defines dissolution as the change in a business caused by a partner ceasing to be associated with its carrying on, and prescribes the causes of dissolution, and states the rights, powers and liabilities of partners after dissolution, rules for distribution of assets, rights and powers on continuance of the business and the rights of retiring partners and the estates of deceased partners. In this part of the act several changes in the genefal rules of law have been made, beginning with the definition of dissolution as not a termination of the partnership. Section 31 allows dissolution in contravention of an agreement to continue the business for a fixed term, a rule not accepted by all of the decisions. Section 38 provides for damages if a dissolution is wrongfully made, in breach of contract. Section 35 changes the generally accepted rule in providing that actual notice of dissolution need only be given to those who have formerly extended credit to the firm, and not to those who have had former dealings with it. Section 38 gives a partner on disso-

lution the right to receive his share of the surplus in cash, thus setting at rest a disputed proposition. Section 40 makes the contributions of partners to losses a part of the partnership assets. Section 41, in connection with Section 17, makes one of the most radical changes, in providing that on retirement of a partner or admission of a new one, and a continuance of the business without liquidation, the creditors of the old firm become creditors of the new one, while under the general rule today the old creditors have no right against the new firm as such or its assets, in the absence of assumption of their debts. Section 34 makes all the partners liable for the act of a partner in the course of firm business done after dissolution of the firm by act of a partner, death or bankruptcy, but before he had knowledge of such fact.

§ 13. Uniform Partnership Act as considered in succeeding chapters.—There has been no text on partnership published since the Uniform Partnership Act has been drafted and adopted, and since it seems likely to be adopted in many jurisdictions in this country, perhaps in most, its provisions will be discussed rather fully in this book, so far as practicable in the absence of decisions construing it. In considering the various subdivisions of the general subject of partnership in the following chapters, reference is made specifically to the different sections of Uniform Partnership Act, especially where it has changed the general or prevailing rule, or where it adopts one of several conflicting rules. It may be said that while the Uniform Partnership Act is not perfect, and while in some minor details it may fail of being entirely satisfactory, on the whole it marks an advance. The great advantages to be secured from it are definiteness and certainty in statement of the rules of partnership law, and uniformity of that law in the jurisdictions adopting it. The first of these advantages may be urged in favor of any codification; the second is of peculiar force in the United States, with approximately fifty state courts of last resort and their variously conflicting decisions. The time spent in its framing, by men of

high attainment, who are the greatest living authorities in America on partnership law, and their sponsorship for it, should indicate that it is practically as sound and workable a code of laws as can be made in the present state of human enlightenment.

CHAPTER II

DEFINITIONS

SECTION

25. Definitions generally.
26. Difficulty of definition.
27. Partnership liability the real question.
28. General aspects of partnership liability.

§ 25. Definitions generally.—Partnership may be defined as the relation existing between two or more individuals or associations of individuals, who have associated themselves together for the purpose of sharing the profits and losses arising from a use of capital, labor or skill in some common transaction or series of transactions. This definition does not attempt to cover the various conditions arising out of the relation, such as agency, etc., but simply points out the essential elements of the term.

Mr. Elliott in his work on contracts gives the following definition: "A partnership is the relation which results from a contract whereby two or more competent persons, each of whom is thereby given power to act in the double capacity of principal for himself and agent for his associates within the scope of their agreement, combine their property, labor or skill in a lawful enterprise or business, as principals, to share as common owners in the resultant profits."[1]

The Uniform Partnership Act defines partnership as "an association of two or more persons to carry on as co-owners a business for profit."[2] In this definition, "business" includes every trade, occupation or profession, and "person" includes individuals, partnerships, corporations and other associations.[3] Many other definitions are collected in the notes.[4]

[1] Elliott Contracts, § 476.

[2] Uniform Partnership Act, § 6.

[3] Uniform Partnership Act, § 2.

[4] The following are various definitions that have been given of a partnership. "Partnership is the relation

The persons who have joined in a partnership relation are called partners. The relation is also spoken of as copartnership, the term being synonymous with partnership, and the partners are

subsisting between two or more persons who have contracted together to share as common owners the profits of a business carried on by all or any of them on behalf of all of them." Shumaker Partnership (2 ed.), § 2.

"Partnership is a legal relation based upon the express or implied contract of two or more competent persons to unite their property, labor or skill in carrying on some lawful business as principals for their joint profit." Mechem Partnership, § 1.

"A partnership is a voluntary unincorporated association of individuals, standing to one another in the relation of principals, for carrying out a joint operation or undertaking for the purpose of a joint profit." Dixon Partnership, § 1.

"Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." Parsons Partnership, ch. 2, § 1.

"Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them." Pollock's Dig. Partnership (3 ed.), § 4.

"Partnership is a voluntary contract between two or more persons, joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade." Watson Partnership, p. 1.

"Partnership is a relation existing, by virtue of a contract, express or implied, between persons carrying on a business owned in common, with a view of profit to be shared by them." Gilmore Partnership, § 1.

"A partnership is a combination by two or more persons of capital, or labor or skill, for the purpose of business for their common benefit." Parsons Partnership, p. 6. This definition was approved in Morse v. Pacific R. Co., 191 Ill. 356, 61 N. E. 104; Evans v. Warner, 20 App. Div. 230, 47 N. Y. S. 16.

"Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one of the sole agent of the others and of the business." Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. Quoted in Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397.

called copartners. Often the organization carries on business in a certain name, generally a combination of the names of the members. This name is the firm name. In ordinary commercial language a partnership is often spoken of as a firm, or concern.

"A partnership is a joint undertaking to share in the profit and loss." Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192.

There is a partnership whenever such a relation exists between two persons that each is as to the other, in respect of some business, both principal and agent. Unless such a relation exists, they are not partners, and partnership is but a name for this reciprocal relation. Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282.

Partnership is a contract involving the mutual consent of the parties for the purpose of carrying on a commercial business—a business bringing a profit; and dividing the profit in some shape between the partners. Jessel, M. R., in Pooley v. Driver, 5 L. R. Ch. Div. 458.

"Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportion." 3 Kent Com. 23. The above definition is approved in the following cases: Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Omaha &c. Refining Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 853; Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836; Waggoner v. First Nat. Bank, 43 Nebr. 84, 61 N. W. 112.

"A partnership is a contract between two or more parties to combine their capital, labor and skill, or some or all of them, in a business in which they are to have a community of interest, as principals, for the purpose of joint profits. The sharing of profits is not a conclusive test of partnership, and as between themselves the question of partnership is one of intention on their part." T. R. Foley Co. v. McKinley, 114 Minn. 217, 131 N. W. 316; O'Brien Mercantile Co. v. McKinley, 114 Minn. 521, 131 N. W. 319.

Partnership is "a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionally between them." Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607. Substantially the same definition is found in Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376.

"A partnership is a contract, express or implied, between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in business, and to divide the profits and bear the losses in certain proportion." Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424. Substantially the same definition is found in Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084.

A "partnership" is an agreement between two or more persons to unite their labor, skill, money and property, or either, in a lawful business for their mutual benefit. Eilers Music House v. Reine, 65 Ore. 598, 133 Pac. 788.

It is said by Mr. Justice Lindley: "The terms partnership and partner are evidently derived from to part, in the sense of to divide amongst or share, and doubtless the division of profits

"Partnership is the result of a contract between two or more competent parties to combine their money, property, skill or labor for the transaction of some lawful business for profit." Conyngton Partnership Relations, § 1.

"Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding, that there shall be a communion of the profits thereof between them." Story Partnership (6 ed.), § 2. The above definition has been substantially adopted in the following cases: Berthold v. Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; Hunt v. Oliver, 118 U. S. 211, 30 L. ed. 128, 6 Sup. Ct. 1083; Stone v. Boone, 24 Kans. 337; Post v. Kimberly, 9 Johns. (N. Y.) 470; Niagara County v. People, 7 Hill (N. Y.) 504; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; In re Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Galveston &c. R. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301. See also Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n (this case contains an exhaustive review of the subject); T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316.

The English Partnership Act of 1890, 53 and 54 Vict., ch. 39, § 1 (1), defines partnership as the relation which subsists between persons carrying on a business in common with a view of profit.

Partnership is "the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." Cal. Civ. Code, § 2395; Mont. Civ. Code, § 3180; N. Dak. Civ. Code, § 4370; S. Dak. Civ. Code, § 4027; Westcott v. Gilman (Cal.), 150 Pac. 777.

"A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." Ga. Civ. Code, § 2629.

A partnership is "as between the members thereof, the association, not incorporated, of two or more persons who have agreed to combine their labor, property and skill, or some of them, for the purpose of engaging in any lawful trade or business, and sharing the profits and losses, as such, between them." Partnership Law, N. Y. Laws (1897) ch. 420, § 2.

"Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties." Civ. Code, art. 2801.

By the Civil Code of Louisiana, art. 2825, a commercial partnership is one formed for the buying and selling of personal property, and the carrying of such property for hire by ships or other vessels. Shreveport Ice &c. Co. v. Mandel, 128 La. 314, 54 So. 831.

The Civil Law definition is thus given by Pothier Traite du contrat de Societe. "Le contrat de societe est

amongst the partners is an almost universal object of partnerships. But this object appears to be rather an accident than of the essence of the partnership relation."[5] The term, "firm," is probably derived from the medieval Latin firma, signature, having reference to the firm name by which contracts of the partnership were signed.

§ 26. Difficulty of definition.—One point of practical agreement may be noted in almost every instance where a text-writer has submitted a definition of partnership, or where a court in deciding a case has attempted a similar task—the difficulty in framing a satisfactory definition has seemed so great that comment on such difficulty accompanies most definitions.[6] Some

un contrat par lequel deux ou plusiers personnes mettent, ou s'obligent de mettre, en commun quelque chose, pur faire en commun un pforit honnete, dont ils s'obligent reciproquement de se rendre compte." He also gives the following definition in another work, Pothier Pand. lib. xvii, tit. 2, art. 1, § 1: "Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac licitum in commune faciendi."

The Prussian code, Allgem. Landsrecht fur die Preuss. Staat th. i. tit. 3, § 169, thus defines the relation: "Ein Vertrag durch welchen mehrere Personen ihr Vermogen oder Gewerbe oder auch ihr Arbeiten und Bemuhungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt."

[5] Lindley Partnership (8 ed.), p. 10.

[6] "The most difficult question involved in a consideration of the law of partnership is the determination of what, in fact, constitutes a partnership. Indeed some of the best minds that have grappled with the subject have been reluctant to formulate a definition, and the success of those who have overcome this reluctance must have been small, to merit the remark of an eminent jurist of to-day that 'the various definitions have been approximate rather than exhaustive.'" George Partnership, p. 2.

Mr. Justice Lindley says: "To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not be justly taken. All that they can usefully attempt is to analyze the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion. Without attempting, then, to define the terms partners and partnership, it will suffice to point out as accurately as possible the leading ideas involved in those

reason for the divergent definitions is easily discovered in the different statutory enactments in the various states and nations, and also in the different phases of the subject as brought to the attention of the particular court giving the definition, and in the consequent effect of such a decision upon the ideas of a text-book writer within the immediate influence of such decision. No discussion of the merits of the different definitions will be attempted, as the reasons for their formulation and their relative strength or weakness will largely appear in the chapters immediately succeeding.

§ 27. **Partnership liability the real question.**—The definitions of a partnership, varying and uncertain as they are, may perhaps be understood better, when one considers that the element of partnership with which the decisions have almost always been concerned, is partnership liability. In almost every case in which a partnership has been defined, the real question has been whether certain persons were liable to each other, or to third parties, as partners. Partnership liability differs in too many ways from the liability arising from any other relation in which the parties may place themselves to be defined in a few words. Several of the succeeding chapters will be concerned with partnership liabilities, rights and duties, and the main questions connected with partnership liabilities will be left for those chapters. But it is well to bear in mind from the first, that the question considered in nearly

words. The terms in question are evidently derived from to part, in the sense of to divide amongst, or to share, and this at once limits their application, although not very precisely; for persons may share almost everything imaginable, and may do so either by agreement amongst themselves or otherwise. But in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement is the grand characteristic of every partnership, and the leading feature of nearly every definition of the term." Ewell's Lindley on Partnership, p. 1.

It was said in Donnell v. Harshe, 67 Mo. 170: "A definition of part-

all the cases is not so much what a partnership is, as, Is there partnership liability in this particular case?

§ 28. **General aspects of partnership liability.**—The general elements of partnership liability are well stated in the case of Meehan v. Valentine.[7] In this case, Mr. Justice Gray said: "In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than * * * that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons."

Judge Stone, in the case of Goldsmith v. Eichold,[8] in discussing the nature and essentials of the relation, says: "Partnership is not necessarily an entire merger of the individual, his labor, energy, or estate in the firm. The extent of the merger is determined by the agreement entered into, and the purpose the partners have in view. Anything left out of the partnership agree-

nership broad enough to embrace all cases and narrow enough to exclude such as ought to be excluded, has been found a very difficult and embarrassing task to those writers who have published books on the subject. The courts have been embarrassed, also, in nice refinements about partnerships inter sese, and partnerships which are only as to creditors."

"It is not practicable to frame an exact and comprehensive definition of a partnership, for there can be no rigid test applicable to all cases." T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316.

[7] 145 U. S. 611, 36 L. Ed. 835, 12 Sup. Ct. 972.

[8] 94 Ala. 116, 10 So. 80, 33 Am. St. 97.

ment and its views, whether it be money, property, labor or skill, pertains to the individual in as absolute right, as if there had been no contract of partnership. The merger of the individual into the firm or company extends to and includes everything embraced, expressly or impliedly, in the terms of the agreement, and to that extent changes the character of his ownership. The individual parts with the separate right and power to manage, direct and control that of which, before that time, he had been supreme arbiter. His dominion was an integer. It becomes a fraction. He surrenders to the partnership an interest in his property, labor, skill, energy, one or more, as the agreement may bind him by express or implied stipulations, in consideration of a corresponding surrender, to like extent and for like purposes, by his copartners. The agreement consummated, each partner becomes seized and rightfully possessed of the same interest in and power over whatever has been contributed to the firm by his copartners, as he retains in that contributed by himself. This and no more. These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a cestui que trust. A trustee, so far as his own duties bind him; a cestui que trust, so far as duties rest on his copartners. And it is sometimes said that each partner is both a principal and an agent; a principal to the extent he represents his own interest, but an agent only so far as he represents his copartners. The first duty devolved by this trust on each of the partners is to apply the partnership effects to the payment of the debts of the partnership, and not to pervert them to individual uses or wants, without the consent of the copartners. Any attempt to so pervert them, whether by private arrangement or under judicial proceedings, can be intercepted by the nonconsenting partners. This. on the plain principle that, being beneficiaries under the trust, they have a clear right to prevent its breach. The trust goes farther. After discharging all the partnership

liabilities, the residuum is still held in trust for partition or distribution among the several partners, according to their several interests; and the same rights and remedies exist to preserve, protect and secure the proper administration of the trust fund to this end, as are given in enforcing the payment of debts."

These quotations deal mainly with the extent of partnership liability as between the partners, and do not include all the elements of partnership liability as to third persons. The two most striking elements of such liability, which will be merely mentioned here, are, the binding of one partner by the act of another, and the fact that not only is the partnership property liable for debts incurred by the partnership, but that the individual property of each partner is also liable, each partner being individually liable for the acts of the partnership. This is the feature that distinguished it from the liability of a stockholder in a corporation.

CHAPTER III

ANALYSIS AND TESTS OF PARTNERSHIP

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§ 35. **Tests of partnership in general.**—A definition of partnership has been previously given, and an analysis of the elements and of the tests of partnership will be considered in this chapter. Different authorities present various tests of partnership. Participation in profits, participation in profits and losses, mutual agency, intention of the parties and sharing of gross returns, have all been advocated as the true tests. It would seem that this diversity of opinion grows in part from the different angle from which the subject is viewed by the various authorities. Some look upon the question simply as a relation between the alleged partners and third persons, while others consider it as the relation existing between the members. The latter seems to be the proper conception, as the relation is entered into for the mutual aid and benefit of the partners themselves, and

the relation of the firm to third parties is merely incidental to this main object, and many of the decisions or writings, giving various tests of the relation, have no real bearing upon the status of the partnership itself, that is, whether an actual partnership exists, but simply hold that the alleged partners have, by their actions, placed themselves in such a position that they have incurred certain obligations in the same manner and to the same extent as if they had been partners. Under this theory, there would probably be a double test of actual partnership—first, a contract to share the profits and losses of a transaction or business, and, second, an intention to form a partnership. Assuming the above theory to be correct, we come to the other and more difficult question as to what acts of a party will raise an implied partnership where there is no real one—will throw a partner's obligation upon one not in fact a partner, and will hold property of persons not partners as if it were partnership property, and an inquiry will be made into the various phases of this implied relation.

§ 36. English law—Test of profit sharing—Bloxham v. Pell.—The year 1775 is unique in the history of partnership law, as in this year three cases were decided which held a very important place in English and American law. In the case of Bloxham v. Pell,[1] plaintiffs sued Pell, together with others, alleging that Pell was a secret partner; and it appeared that Pell and one Brooke entered into a contract of partnership; that after one year, and before the expiration of the partnership agreement, the partners agreed to dissolve the partnership. Brooke desired to continue the business, and Pell wished to retire. Pell left money in the business, for which Brooke gave him security, and interest at five per cent., and further agreed to pay Pell a certain amount of money each year for six years, in lieu of profits, and to give Pell access to the books of the business. Brooke became bankrupt before he had paid anything to Pell. Lord Mansfield held that Pell was a secret partner, as he was to receive part of the profits, and, as this was perhaps something of an innovation,

[1] 2 Wm. Bl. 999 (1775).

he attempted to fortify his position by stating that it must either be partnership or it would be usury, which was then a crime, and stated that Pell could not say that it was usury, and not partnership. This would appear a very artificial basis for a decision, so far as partnership was made an escape from usury, and has been severely criticized by Justice Lindley.[2] "Whilst the laws against usury were in force, a tendency was sometimes manifested to treat what was in truth a loan at usurious interest, and therefore illegal, as a contract of partnership and therefore legal. This view of the transaction had the merit of apparently holding the parties to their bargain, but in truth the bargain to which they were held was very different from that which they themselves had contemplated, and by treating such transactions as partnerships and not as loans, an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove."

§ 37. English test of profit sharing—Young v. Axtell.— This same year was also decided the case of Young v. Axtell,[3] which was an action to recover money for coal sold and delivered by the plaintiff, a coal merchant, and in which an agreement was given in evidence, stating that the defendant Axtell had lately carried on the coal trade, and the other defendant did the same, and Axtell was to bring what customers she could into the business and the other defendant was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers, or were of her recommending, and it was also proved that bills were made out for goods sold to Axtell's customers, in the joint names of defendants. Lord Mansfield said: "He should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out

[2] 1 Lindley Partnerships (5th Eng. ed.), p. 16.

[3] Unreported, but cited in Waugh v. Carver, from a MS. note, 2 H. Bl. 242.

as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used."

§ 38. English test of profit sharing—Grace v. Smith.—The same doctrine was adhered to and amplified the same year in the case of Grace v. Smith.[4]

In this case the defendant, Smith, and one Robinson entered into a partnership for seven years, but soon after the partnership was entered into, differences arose, and the partners agreed to dissolve the partnership. The dissolution was made public in proper manner. By the terms of the agreement of dissolution, Robinson was to continue the business, and to retain the assets, while Smith was to receive therefor his contribution to the firm, and one thousand pounds as his share of the accrued profits of the partnership, and to loan Robinson four thousand pounds for seven years at five per cent. interest, and three hundred pounds per annum in addition, and for this loan Smith took security from Robinson. Later, Robinson paid Smith two years' annuity, certain sums for interest and as a gratuity, and further sums to pay debts due by the partnership. Still later, Robinson assigned all his effects to Smith to secure Smith's claims, and in 1770, Robinson became a bankrupt, and Smith was sued as a secret partner. The court held in favor of Smith, holding him not a partner.

The report of the brief opinion in this case, very likely given orally without long consideration, was the foundation of a rule of partnership liability, which continued in England for the greater part of a century, and has not yet been wholly abandoned in other jurisdictions, although long recognized as erroneous. The jury had found for the defendant, and there was a motion by the plaintiff for a new trial on the ground that the verdict was contrary to the law and the evidence. The question was whether the evidence was sufficient to sustain the verdict. The following is the report of the decision: "De Grey, C. J., reported that this

[4] 2 Wm. Bl. 998.

was an action brought against Smith alone, as a secret partner with one Robinson." "De Grey, C. J. The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be lent de novo, or left behind in trade, by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on these profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade of usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial. Gould, J., same opinion. Blackstone, J., same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount. Nares, J., same opinion. Rule discharged."

§ 39. English test of profit sharing—Waugh v. Carver.—The next great case recognizing this rule of profits as a test was the case of Waugh v. Carver.[5]

[5] 2 H. Bl. 235. See also Heyhoe v. Burge, 9 C. B. 431, 19 L. J. C. P. 243; Ex parte Geller, 1 Rose 297, 17 R. R. 219, 2 Madd. 262; Hesketh v. Blanchard, 4 East 144; Ex parte Digby, 1 Deac. 341; Ex parte Rowlandson, 1 Rose 89; In re Colbeck, Buck 48; Ex parte Hamper, 17 Ves.

In this case two ship agents at different ports, each of whom carried on a separate and distinct business of his own, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, the agreement also providing that neither shall be answerable for the acts and losses of the other, but each for his own. It was held that this agreement made them liable as partners to all persons with whom either should contract as agent. This case was decided in 1793, and the principle that sharing in profits makes one a partner was approved by the court, Lord Chief Justice Eyre delivering the opinion, in part, as follows: "The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A and B whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions stock or labor, and on what agreement they were to divide the profits of that contribution, but in all these cases a very different question arises in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons,

412, 11 R. R. 115; Ex parte Chuck, 8 Bing. 469; Ex parte Garland, 10 Ves. 110, 1 Smith 220, 7 R. R. 352; Barry v. Neesham, 3 C. B. 641; Wightman v. Townroe, 1 M. & S. 412, 14 R. R. 475; Labouchere v. Tupper, 11 Moore P. C. 198, 5 W. R. 797; Burnell v. Hunt, 5 Jur. 650, Q. B.; Cheap v. Gramond, 4 B. & Ald. 663.

when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. * * * It is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. * * * But the question is whether they have not, by parts of their agreement, constituted themselves partners with respect to other persons? The case is therefore reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace v. Smith, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason. I can not agree that this was a mere agency * * * for there was a risk of profit and loss. * * * If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty."

§ 40. **Criticism of Waugh v. Carver.**—Upon the statement in this opinion that, "he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts," was based the partnership law of England for the succeeding sixty-seven years. This principle does not seem sound, and the decision in this case and also that in Grace v. Smith have perhaps been more severely criticized than any other decisions of the English courts, nor is it likely that another instance can be found

where a rule of law recognized to be the result of an erroneous decision has so long held sway.[6]

The creditors look, or at least should have a right to look, only to the capital and gross receipts for payment, unless the firm holds out that there is a surplus subject to payment of debts. The payment of profits can not decrease the capital, hence can not prejudice the creditor, for, as long as the capital is intact, the firm is solvent. And until the creditors are paid from the gross receipts, there are no profits. So, the reason given is defective, unless upon the principle that as a legal proposition, the profits as well as the capital are liable for the debts of the firm (which, of course, is correct), but, in common practice, there is really no more security, as the larger business arising from the nondivision of profits would, in general, create a demand for a larger indebtedness. The question resolves itself into this proposition: If the capital is unimpaired, then the assets must be greater than the liabilities by the amount of the capital (unless

[6] In the case of Mollwo v. the Court of Wards (1872), L. R. 4 P. C. 419, Sir Montague Smith said: "It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in Grace v. Smith, that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it, for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the moregagee a partner."

Moss, J. A., in In re Randolph (1877), 1 Ont. App. 315, said: "The case of Waugh v. Carver, rested upon no solid foundation either of reasoning or authority. The reasoning was, that he who takes a share of the profits of a business takes part of the fund on which creditors rely for payment, and ought, therefore, to be responsible to creditors. The utter fallacy of this view was frequently exposed. It was pointed out that upon this principle an annuitant upon a business, or a creditor who charged exorbitant interest upon a loan ought to be responsible to creditors, for he certainly took a portion of the fund to which the creditors look. It was argued, and as is now admitted incontrovertibly, that this decision was not law, but false political economy. It was shewn that its real support from authority was almost as slender as its foundation in reasoning. It was supposed to be supported by a decision of Lord Mansfield, in the case of Bloxham v. Pell, which was never fully reported, but is referred to in a note to Grace v. Smith, the

through loss by reason of a forced sale), and the creditor would not lose anything although profits had been drawn. If, on the contrary, there was an impairment of the capital, then there would be no real profits divided, and hence no detriment to the creditor by reason of the profit rule. Thus it can be seen that the rule laid down in the foregoing cases, or at least the reason given

only other authority on which Waugh v. Carver was rested. Yet in neither of these cases was it necessary to decide that such a principle formed part of the law. Lord Mansfield enunciated no such doctrine, and while DeGrey, C. J., in Grace v. Smith stated the rule in the terms just cited, he joined with the court in refusing to disturb a verdict which had been found for the defendant sought to be charged. Upon this slender peg—little, if at all, more than an obiter dictum, was hung a long chain of decisions, which Mr. Lindley, writing in 1860, deemed beyond the reach of being overruled by any authority short of that of the legislature."

In Chaffraix v. Lafitte (1878), 30 La. Ann. 631, Judge Marr says: "As far as we have been able to discover, the foundation of the decision which has been accepted as authoritative and has controlled the jurisprudence of England and America for nearly a century, seems to be dicta of two of the judges in Grace v. Smith. * * * In Grace v. Smith the simple question was, whether a retiring partner, lending to the partner who continued in trade a sum of money in consideration of a certain annual interest, and an annuity for a term of years, was liable as a partner. * * * The question would not have been different if no social relation had previously existed between Smith and Robinson; and the court, in refusing a new trial necessarily decided that upon the given state of facts, Smith was not liable as a partner. It is difficult to imagine what support this case gave to Waugh v. Carver, and we think we are justified in saying either that Chief Justice Eyer misapprehended and misapplied what was actually decided, or that the case is not correctly stated in any report to which we have had access. * * * We do not hesitate to say that, in our opinion, Waugh v. Carver could never have stood the test of judicial criticism; and that it was accepted and allowed to control subsequent jurisprudence, only because of an exaggerated respect for the doctrine of stare decisis."

Doe, J., in the case of Eastman v. Clark (1873), 53 N. H. 276, 16 Am. Rep. 192, after stating that the profit-sharing test originated in certain dicta in the opinion in Grace v. Smith, "that the decision was probably made, and the dicta thrown out orally, without any deliberation before or after the brief argument, and as soon as counsel sat down, and a reporter's memorandum of the unpremeditated and unguarded utterances of even the highest tribunals does not always carry a high degree of authority," further states that the remark of De Grey that every man who shares in the profit of a trade should also bear his share of the losses, must be presumed to be based on the admitted fact of partnership, and that the sentence stating that one who takes part

for the rule by the courts, while not wholly without merit, is nevertheless based upon a weak foundation.

§ 41. Net and gross profits.—Attention should be directed here, however, to the fact that profit, in the above cases, means net profits, and not gross profits. These terms are often popularly confused, but, in fact, no confusion should arise. Net

of the profit takes part of the fund on which the creditor relies, refers also, only to one who is a secret partner. He further says, "the whole argument, so often reiterated from 1775 to the present time in favor of such a test, has been a mere repetition of the supposed meaning of the reported remark of De Grey, and if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment. Who is 'any one,' and what is 'the profit'? A creditor is 'any one,' and the balance left, over and above the capital, losses, expenses and debts of every kind, is 'the profit,' in a certain sense. If it is urged that De Grey meant that creditor A should be liable to other creditors because he is paid or is to be paid out of what may be left after he is paid; that this doctrine was approved by the English authorities from 1775 to 1860, and by the American decisions to the present time; and that it is a settled rule of law which nobody but the legislature can change—it is answer enough to say that neither De Grey nor any one else could have meant any such thing; that if De Grey and everybody else have inadvertently used a formula which, upon investigation, is found to be capable of no other meaning than that it is certain they did not use it in that sense, and, therefore, we have their authority for not using it in that sense; that, if they did not use it in any other sense, we can not, upon their authority, either use it in any other sense, or use it at all; and that, if they did use it in some other sense, we are not called upon to accept or reject that other sense before it is discovered. To use the formula in a sense in which we know the authorities could not have intended to use it, would be an irreverent and revolutionary perversion and overthrow of precedent. If it could be shown that De Grey and all the venerated authorities of the last hundred years meant that creditors rely for payment on what is left after they are paid, it would require no great courage in this age to say that we do not propose to assert our belief in a dogma that is either preposterous or unintelligible. * * * In whatever sense De Grey used the word 'profit,' he did not mean that a creditor, relying upon and paid out of the 'profit' or any other fund, is by such reliance and payment, transformed into a copartner with his debtor, and made liable to all the other creditors. Twice in his brief opinion he distinctly recognizes the right of a creditor to rely on 'profits' for payment (including, of course, the right to be paid out of the 'profits' relied on), without thereby becoming liable as a partner. By 'any one' he did not mean a creditor. Whom else could he mean but a partner? If by 'profit' he meant gross 'profit,' that

profits are, in reality, the only real profits, as the term gross profits applies to more than real profits, and usually includes gross income, which name should be used as a designation, for there might be no real profits at all in a transaction even where the gross income was large, as the expenses might be even larger. However, the term "gross profits" has been used, even by judges and law writers, and the above statement as to gross profits not being a test of partnership was made, in order to clear any misunderstanding, but the term profits, as hereinafter used, will refer to net profits alone. The above provision excepting gross profits from the operation of the rule has been repeatedly recognized by the English courts. Lord Ellenborough so held as early as 1808 in the case of Dry v. Boswell,[7] in which the agreement with Russell appeared to be this, that the defendant, in consideration of working a certain lighter, should receive half her gross earnings, and that Russell, as owner, should receive the other half, and Lord Ellenborough said that this was only a mode of paying the defendant wages for his labor, and was different from a sharing of profits and losses, so that under these circumstances no partnership could be considered as existing between him and the owner of the lighter. That was then, and still is, the unquestioned law in England.

§ 42. Test of sharing profits and losses.—The test of sharing profits and losses is really brought into the cases of Grace v.

is not the fund generally referred to when partners agree 'to share the profits.' If by 'profit' he meant 'net profit'—a balance of gross 'profit' left after all creditors are paid—who but a sole principal or a partner can take a part of that fund? If, by 'profit,' he meant a balance of gross profit left after the payment of all creditors except those deferred ones who are to be paid out of that balance; and if he meant that such deferred creditors are liable to those not thus postponed, the contrary doctrine is too firmly established by an overwhelming preponderence of the subsequent authorities, English and American, to be now questioned." 3 Kent's Com. 25-33; Collyer on Partnership, §§ 39-44; Story on Partnership, §§ 32-49; Parsons on Partnership, §§ 81-85n; Berthold v. Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; In re Francis, Pacific Law, Rep., Dec. 17, 1872 (U. S. Dist. Ct. of Ore.).

[7] 1 Camp. 329. See also Wilkinson v. Frasier, 4 Esp. 182 (1803); Cheap v. Gramond, 4 B. & Ald. 663 (1821).

are by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business. * * * It was argued that, as they would be interested in the profits, therefore they would be partners, but this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i. e., that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made. * * * I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore, he would stand in the position of principal toward the ostensible members of the firm as his agents. This was certainly the case in Waugh v. Carver."

Lord Wensleydale, who agreed with Lord Cranworth, gave as the reason of his decision, that in the particular case, there was not, "such a participation of the profits as to constitute the relation of principal and agent between the creditors (the defendants) and the trustees, who actually made the contract sued on."

§ 44. No necessity in Cox v. Hickman for test of intention.—However, although this test was thereafter recognized upon the strength of this decision, the same result could have been obtained without injecting this test, and by proceeding under the old rule as laid down in Grace v. Smith and Waugh v. Carver. In those cases, the rule as to sharing of profits being the test of partnership was qualified by the further rule that the profits must be profits as such, and not as a fund simply for payment. In this case (Cox v. Hickman) there was no sharing of profits as such, but simply the creation of a fund out of which to pay fixed amounts to the creditors, and no more. Every cent of the profits went to the Smith's credit, either to pay the creditors therefrom and thus save the business and capital, or, if the profits exceeded the debts, to the Smiths personally, thus bringing the case squarely within this provision of the early cases, showing no partnership, entirely aside from the test of intention injected into the case.

§ 45. Change of English law—Bullen v. Sharp.—That the English law was entirely changed in this respect, however, is clearly shown by later cases, among which is Bullen v. Sharp,[9] decided about five years after Cox v. Hickman.

Blackburn, J., says: "I think that the ratio decidendi is, that the proposition laid down in Waugh v. Carver, viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation in profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business. * * * But even if we assume that the law supposed to ex-

[9] L. R. 1 C. P. 86.

ist before Cox v. Hickman remains untouched, that is to say, the supposed law of Waugh v. Carver, I think the same conclusion ought to be come to. Lord Wensleydale does not notice that case. Lord Cranworth does, and with submission, gives a better reason for the decision than is to be found in the case itself. The chief justice there says the question is whether they have not constituted themselves partners in respect to other persons, and puts his decision on the ground that he who takes a moiety of all the profits indefinitely, shall by operation of law be liable to losses. Let us hope that this motion is overruled—one which I believe has caused more injustice and mischief than any bad law in our books. * * * It seems to me then, there is here no partnership, no taking of profits which could have brought the case within what was supposed to be law before Cox v. Hickman, that on reason and principle that supposed law was wrong; that it is now condemned by the authority of Cox v. Hickman; that anyhow Cox v. Hickman is the governing case."

Bramwell, B., in a very emphatic opinion, repudiates the old test of profits, and adheres to the principle set out in Cox v. Hickman, in the following language: "I proceed to examine the authorities. The labor formerly needful is now rendered unnecessary by Cox v. Hickman. That case has settled the law, I may be permitted to say, in a perfectly satisfactory manner. * * * I hope I shall not be charged with arrogance for the way in which I have spoken of bygone opinions. The law had drifted into the condition from which it was rescued by Cox v. Hickman. No one in particular was responsible for, and probably no one person could have put it at once in the position it was in. But the true line had been departed from, at first but a little, and for a good reason; and every subsequent move took it further away in a wrong direction, till it was happily brought back by Cox v. Hickman." These words show the universal acceptance of the authority of Cox v. Hickman, which decision appears to have been welcomed, probably on account of the unsatisfactory condition of the law prior thereto.

In the case of Holme v. Hammond[10] the doctrines of Cox v. Hickman and Bullen v. Sharp were reaffirmed, and Kelly, C. B., stated that, even considering the older cases, "It is enough to say that, whenever the plaintiff has failed to establish a contract of copartnership, the action has failed and the decision has been that the defendant was not liable."

§ 46. Doctrine of intention—Mollwo v. The Court of Wards.—Sir Montague Smith said, in the case of Mollwo v. The Court of Wards:[11] "The judgment in Cox v. Hickman had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where from such perception alone, it may, as a presumption, not of law, but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties."

§ 47. Criticism of test of intention.—The test of intention, however, while it is probably conclusive as to partnership inter sese, which is in fact the only true partnership, is, nevertheless, not, when standing alone, a true test of partnership liability as to third persons; as a perusal of the cases, even those above cited in favor of the test, will show that there are many conditions under which a person who never actually contemplated partnership, may be held by partnership creditors as if he were a partner. Even in the English cases cited above, when they are read as a whole, it appears that both tests (profit and intention) are necessary, or, at least, are both considered, and that sharing profits alone does not create partnership relations, neither does intention alone govern, unless coupled with other matters.

[10] L. R. 7 Ex. 218, 20 W. R. 747. [11] (1872) L. R. 4 P. C. 419, 435.

§ 48. **English Partnership Act.**—During the same year in which was decided the case of Bullen v. Sharp (1865) the act of 28 and 29 Vict., ch. 86, became a law, and embodied in statute law many of the principles of the case of Cox v. Hickman, thus further recognizing and perpetuating this principle. This act defined partnership as the relation which subsists between persons carrying on a business in common with a view of profit, and makes sharing of profits prima facie, but not conclusive, evidence of partnership.

§ 49. **Test of estoppel.**—Some writers use the term partnership by estoppel. This is a misnomer, as from the very meaning of the term estoppel, it would be impossible. All that can possibly be meant by this term is, that, while there is no real partnership, yet, by the words or acts of the party sought to be held, he is precluded from using this defense of no partnership, and he is under the same obligations therein to the party injured, as if he were a partner. The term, in its present discussion will only be used in the last sense, and not as any real partnership.

The early English reports do not touch upon the subject of partnership liability by estoppel to the same extent as in other branches, and yet the doctrine is recognized in the early cases as fully established. The case of Waugh v. Carver, above cited,[12] is an authority in point, and Chief Justice Eyre, in his opinion, recognizes the rule, in the following language: "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labor nor money, and, to go still further, not to receive any profits, but if he will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would

[12] See ante, § 39.

have lent nothing." Thus, as early as 1793, and probably long before, this principle was considered as established beyond question. Almost a century later we find the principle again recognized, in another noted English case.[13]

The firm of W. H. Rogers & Company was a partnership composed of Scarf and Rogers. Scarf retired from the firm, and one Beech entered the firm, and he and Rogers continued the business under the name W. H. Rogers & Company. Jardine, who had dealt with the old firm, and who had no notice of the change, sold goods to the new firm, and later, after bankruptcy of the new firm, sued Scarf. Lord Watson, in his opinion, used the following language: "The appellant (Scarf) had, in point of fact, ceased to be a partner of the firm of W. H. Rogers & Company, before the goods were ordered or supplied to the new firm. Notwithstanding that fact, he was estopped from asserting as against the respondent, who had been one of his customers, that the contract was not made with the old firm, because notice had not been given to the respondent of its dissolution by his ceasing to be a partner." Several years before the above decision, Lord Cranworth, who was then lord chancellor, in the case of In re Rowland and Crankshaw, said:[14] "These two gentlemen traded under the name of 'Rowland & Co.' and tradesmen supplied them with large quantities of goods, and then they became bankrupts; and it is now said that they were not partners, and that the real agreement between them was that everything belonged to Crankshaw. That is no reason; and as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland and Crankshaw are the persons with whom they dealt, and that the goods are joint goods." The estoppel in the above cases, as will be seen on reading the entire reports of them, only governs when the party setting it up was not aware of the actual facts, and relied upon the facts upon which he bases the estoppel.

[13] Scarfe v. Jardine, 51 L. J., Q. B. 612, 7 App. Cas. 345, 47 L. T. 258, 30 W. R. 893.

[14] L. R. 1 Ch. App. 421 (1866).

§ 50. **Summary of English law.**—Inasmuch as this work is primarily an American work upon the subject, an exhaustive study of the English cases has not been attempted, but only the great landmarks in the subject have been discussed, those cases which have made law or have been the leading English authorities upon the subject, and which have materially aided in shaping the American law applying thereto, and attention is now turned to the American law, leaving the English law, for the time being, as follows: From an analysis and comparison of the cases herein discussed, and other cases adopting the rules therein established, the following is submitted by the author as his understanding as to the status of the English law under the above decisions. First, partnership inter sese, the only real partnership, had, under all the above decisions, its true test in the intention of the parties, and growing out of this, the sharing of profits and losses and mutual agency. Second, partnership inter alios or quasi partnership, had as its test, under the early decisions, the sharing of profits and losses, and, later, under Cox v. Hickman, the intention of the parties, which, in turn, necessarily implied the sharing of profits and losses and mutual agency. Third, partnership liability by estoppel, by its terms, was no partnership at all, but a status of the party sought to be held liable as a partner, growing out of his holding himself, or permitting himself to be held out as a partner, and the consequent refusal of the law to permit him to deny the relation. The only test of this relation possible would be his active or passive acts or representations.

§ 51. **American law—Test of profit sharing.**—The case of Waugh v. Carver,[15] although an English case, was recognized by American courts as authority, and its test of profit sharing was early incorporated into American law. Inasmuch as each state in the United States has its separate laws, and the laws, through statutory enactment or through judicial decisions, often differ materially, a rather general discussion of the subject is here given.

[15] 2 H. Bl. 235.

§ 52. **The early rule.**—The early American law is perhaps nowhere better stated than in 1854 in the case of Smith v. Wright,[16] where Edwards, J., thus laid down the rule as he found it in American law: "The well-established rule is, that if a person partakes of the profits of any branch of trade or business, he is answerable as a partner for its losses. The reason of this is, that if he takes a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts. The only qualification of this rule which has ever been acknowledged is, that when a person stipulates to receive a sum of money in proportion to a given quantity of the profits, as a reward for his services, he is not chargeable as a partner."

The exception will be dismissed until a later full discussion, and the main proposition of the rule of test of profits will be here considered. The same general rule as to the test of profits was adhered to in many earlier decisions, particularly in New York, As early as 1819, in Walden v. Sherburne,[17] the court said: "No principle is better established than that every person is to be deemed in partnership if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade."[18]

Following the old English decisions, our early courts very generally recognized that sharing profits (and, in some cases, losses) constituted a partnership, or at least partnership liabilities, subject to exceptions hereinafter noticed. The case of Cox v. Hickman, although it completely revolutionized the English partnership law, was not to the same extent embodied in American partnership law, yet it undoubtedly had a considerable influence in most jurisdictions, and upon American partnership law in general.

[16] 4 Abb. App. (N. Y.) 274, 1 Abb. Prac. 243.

[17] 15 Johns. (N. Y.) 409.

[18] Dob v. Halsey, 16 Johns. (N. Y.) 34 (1819), 8 Am. Dec. 293; Champion v. Bostwick, 18 Wend. (N. Y.) 175 (1837), 31 Am. Dec. 376; Cushman v. Bailey, 1 Hill (N. Y.) 526 (1841); Everett v. Coe, 5 Denio (N. Y.) 180 (1848); Oakley v. Aspinwall, 2 Sandf. 7-21, 3 Code Rep. 209, 4 N. Y. Super. Ct. 7 (revd. 4 N. Y. 513).

§ 53. The Pennsylvania rule.—In some states, particularly in New York and Pennsylvania, Cox v. Hickman apparently had no influence whatsoever. In 1869, the learned Judge Sharswood, in a leading case[19] upon this subject, pointed out the new English rule of Cox v. Hickman, but followed the rule of Waugh v. Carver, saying: "It is entirely too late now to question either the rule or the exception. We are bound to stand super antiquas vias by our own decided cases." This opinion clearly demonstrated two things. First, that the rule of Waugh v. Carver was the accepted rule of Pennsylvania, and, second, that the law of that state was in no wise affected by Cox v. Hickman.

In the same year, in the case of Lord v. Proctor,[20] Edwards v. Tracy was followed and cited, the court saying that the rule in Waugh v. Carver was too ancient a landmark in our law to be now disturbed. The next year, 1870, certain changes in this old rule were made in Pennsylvania by statute, but there has been no other change recognized by the courts of that state prior to the adoption in 1915 of the Uniform Partnership Act. The legislation of 1870 provided that a loan of money to an individual or a firm upon an agreement to receive a share of the profits of the business as compensation for the use of the money and in lieu of interest should not make the party loaning the money liable as a partner, except as to the money loaned, provided that the agreement for the loan be in writing, and that the party should not hold himself out as a general partner.

The case of Wessels v. Weiss[21] recognizes the change only so far as provided by statute, and the following observation is made by Judge Fell, in his opinion: "This legislation distinctly recognized the rule as it had existed in this state (Pennsylvania) for fifty years, and in England from 1775 to 1860, and modified it to conform more nearly to the modern English rule of Cox v. Hickman." He further says: "The well-settled rule of Waugh v. Carver was overruled in England in 1860 by the case of Cox

[19] Edwards v. Tracy, 62 Pa. St. 374.
[20] 7 Phila. (Pa.) 630.
[21] 166 Pa. St. 490, 31 Atl. 247 (1895).

v. Hickman, but there has been no departure from it in this state (Pennsylvania) except by legislation in 1870."

Pennsylvania in 1915 was the first American state to adopt the Uniform Partnership Act.[22] Under this act the sharing of profits is prima facie evidence of partnership, which may be rebutted by showing that the profits were received in payment of a debt, as wages or rent, as an annuity to a representative of a deceased partner, as interest on a loan or as consideration for the sale of the business.[23]

§ 54. The New York rule.—New York courts have also refused to recognize the authority of Cox v. Hickman. In the leading case of Leggett v. Hyde,[24] Judge Folger says: "Without discussing those decisions (Cox v. Hickman and others), and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this state—as it has long been—and that we should be governed by it until here, as in England, the legislature shall see fit to abrogate it. The references upon the appellant's points do not show that the courts of this state (New York) have yet exploded the rule I have stated. I have consulted all the authorities cited (save a few of which I had not the books, or as to which there was a miscitation) and I do not find that the rule is questioned, further than to apply to the facts of the particular case some one or more of the exceptions to the rule which I have stated to exist."[25]

§ 55. The Indiana rule.—The rule in Indiana is: "The ultimate and conclusive test of a partnership is the co-ownership of the profits of the business. If there is community of profits,

[22] Laws of Pa. 1915, ch. 15, p. 18.

[23] Laws Pa. 1915, ch. IV, § 7, p. 19; Uniform Partnership Act, § 7, p. 19.

[24] 58 N. Y. 272 (1874), 47 How. Pr. 524, 17 Am. Rep. 244.

[25] See also Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Bailey v. Clark, 6 Pick. (Mass.) 372; Manhattan Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Cushman v. Bailey, 1 Hill (N. Y.) 526; Wood v. Vallette, 7 Ohio St. 172; Messinger v. Second Nat. Bank of Toledo, 6 Ohio C. D. 197, 13 Ohio C. C. 561; First Nat. Bank v. Ballard, 10 Ohio C. D. 298, 10 Ohio C. C. 63; Pierson v. Steinmeyer, 4 Rich. L. (S. Car.) 309; Stratton v. O'Conner (Tex. Civ. App. 1896), 34 S. W. 158.

a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start is in one associate as much as in the other."[26] This statement has been somewhat modified in a later case, and other tests recognized, the court saying: "It is apparent that to establish the partnership relation, as between the parties, there must be (1) a voluntary contract of association for the purpose of sharing the profits and losses, as such, which may arise from the use of capital, labor or skill in a common enterprise; and (2) an intention on the part of the principals to form a partnership for that purpose. But it must be borne in mind, however, that the intent, the existence of which is deemed essential is an intent to do those things which constitute a partnership. Hence, if such an intent exists, the parties will be partners notwithstanding that they purposed to avoid the liability attaching to partners, or even expressly stipulated in their agreement that they were not to become partners. * * * It is the substance, and not the name of the arrangement between them which determines their legal relation toward each other, and if from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business or venture, the law treats it as their intention to become partners, in the absence of other controlling factors."[26a]

§ 56. Other American cases holding the profit-sharing test.—As late as 1907, it was held in Illinois that a partnership may exist, although there is no agreement as to the sharing of losses; that, in fact, the sharing of profits is the test of partnership.[27]

[26] Steele v. Mich. Buggy Co., 50 Ind. App. 644, 95 N. E. 435; Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37.

[26a] Bacon v. Christian (Ind.), 111 N. E. 628 (decided Feb. 25, 1916).

[27] Leeds v. Townsend, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 191 (1807). It was held that an instruction that if defendants entered into business, and after expenses were paid the net profits were to be divided

In a Virginia case,[28] the court said: "In order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business, engaged in for their common benefit. An agreement that something shall be attempted with a view to gain and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every 'partnership' and is the leading feature of nearly every definition of the term." The court further held that an agreement to share losses was unnecessary, since such is implied by law, and that, "if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits while they are undivided and remain as profits, the two are partners."

§ 57. American cases opposing net profits rule.—While some of the American courts followed, and still follow, the doctrine of Waugh v. Carver, many of them soon broke away from it, after the rule was changed in England by Cox v. Hickman.

§ 58. The net profit rule criticised—Eastman v. Clark.—In one of the leading American cases, Eastman v. Clark,[29] from New Hampshire, the arguments in favor of the strict "net-profit" rule are most convincingly disposed of in the opinion of Jeremiah Smith, J., and because of the importance of this case in American law, a rather full quotation from his opinion follows in succeeding sections.

§ 59. Creditors do not rely on profits—Eastman v. Clark.—"One of the principal reasons urged in favor of the supposed doctrine is that already adverted to, viz.: That the man who takes part of the net profits, takes part of that fund on which the cred-

between them, it would constitute a partnership, and both parties would be liable for the firm debts, was proper. Walls v. Atlanta Newspaper Union, 141 Ga. 594, 81 S. E. 866.

[28] Miller v. Simpson (1907), 107 Va. 476, 59 S. E. 378, 18 L. R. A. (N. S.) 962 and note.

[29] (1873) 53 N. H. 276, 16 Am. Rep. 192.

itor of the trader relies for his payment. The short answer to this reason is, that it is founded on a false assumption. Creditors neither can, nor do, rely on net profits for payment. Net profits 'do not exist until creditors are paid.'[80] The very fact that net profits are realized 'presupposes that the creditors of the firm are satisfied, or that the partnership assets are sufficient to satisfy their claims.'[81] And if it were possible in the nature of things for creditors to rely on the net profits as a fund for the payment of their claims, it is not probable that they would do so; for they must know that the amount of the net profits would generally be insufficient for that purpose."

§ 60. Right to a preference or to an account should not make a creditor a partner—Eastman v. Clark.—"Another reason given for this rule is, that if one stipulates for an interest in the profits of a business which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, giving him the full benefit of the increased profits without any corresponding risk in case of loss, it would operate unjustly as to other creditors. This reasoning is effectually disposed of by Mr. Story[82] as follows: 'The creditors to whom he is preferred are only the separate creditors of the actual partners; he has no preference over the partnership creditors, for there are no profits till they are paid, and it is only out of the profits that his remuneration is to come. Why should the fact that he has a priority over one set of creditors make him liable to his last shilling to another set of creditors? A second mortgagee has a priority over the mortgagor's general creditors; but has it ever been argued that therefore his whole property, of every kind, should be liable for the first mortgage debt? Yet the cases would seem very analogous. And though a partner is entitled to an account, yet a person may well be entitled to an account and yet not be a partner. If he is to receive a sum equal to a share of the profits, he is, by the great weight

[80] Testimony of Commr. Fane, quoted in Story Partnership (6th ed.), § 36, n. 3.

[81] 2 Am. L. Rev. 195.

[82] Story Partnership (6th ed.), § 49, n. 2.

of authority, clearly no partner; yet how can he secure the payment of the compensation agreed upon unless he has an account'?"[83]

§ 61. The usury argument fallacious—Eastman v. Clark.—"The argument, that the sharer of the net profits will otherwise receive usurious interest without risk, does not seem very forcible. Usury is punished by the refusal of the law to enforce usurious contracts, or by the imposition of penalties; but it is not customary to punish usury by compelling parties to perform contracts which they never made."

§ 62. The net-profit rule not needed to prevent fraud—Eastman v. Clark.—"The only other alleged reason deserving special consideration at this time is, that the net-profit rule is necessary to 'protect third persons against the frauds which might be practiced, if secret agreements were allowed to be binding on third persons.'[84] It is conceded on all hands that, so far as the agreement is known, it must be binding on all who have knowledge of it,[85] but it is urged that to allow force and validity to a secret agreement would often work a fraud on third persons. In this view, the liability of the sharer of net profits depends solely upon the secrecy of the agreement.

"What are the probable frauds which can not be remedied save by holding the secret stipulator for a share of the net profits liable to pay the entire debts of the concern, in direct contravention of an agreement that he shall not be so liable? If his failure to disclose the agreement has caused persons dealing with the firm to entertain a reasonable belief in the existence of a certain state of facts, and to act on that belief, he can not now be permitted to controvert, to the prejudice of such persons, the existence of such facts. If, for instance, A allows B to hold himself out as the sole owner of a stock in trade and to gain credit thereby, an attachment of that stock in trade by a creditor of B

[83] 2 Am. L. Rev. 199.

[84] Bromley v. Elliot, 38 N. H. 287, 303, 75 Am. Dec. 182.

[85] Bromley v. Elliot, 38 N. H. 287, 303, 75 Am. Dec. 182. See also 2 Am. L. Rev. 7, 8, 202.

will not be defeated by proof that the stock was furnished by A, under a secret agreement between A and B that it should remain A's property. Having knowingly allowed B to gain credit on the faith of his ownership of the stock, A can not now, as against those who have given B credit, deny that B is the owner.[36] The receipt of net profits, while any debts of the concern remain unpaid, seem almost or quite an impossibility; but if a person, entitled only to share in net profits, gets hold, by accident or design, of part of the gross returns, he must of course refund them if needed to pay debts; for his own agreement does not authorize him to receive any dividend until all the debts are paid. A secret stipulator for a share of the gross returns would not be thus cut off by his own agreement from retaining such funds; but, as already intimated, he would be quite as effectually barred by the application of the principles of estoppel. If A allows B to hold himself out to the world as the sole owner of the gross returns of a business, A can not withhold a portion of those gross returns from the creditors who were thus led to trust B. He is estopped from showing a different state of facts from that in which his silence induced the creditors to believe. But the doctrine of equitable estoppel is remedial, not vindictive. The estoppel will not be carried further in any case than is necessary to prevent one party from being injured by his reliance upon the conduct of the other.[37] It is enough to put the party misled in the position he would have been in if the representations actively or passively made by the other party had been true in fact. If B has never allowed himself to be held out as personally liable for debts contracted by A and the creditors of A have had no reason to rely and have not relied on B's security, why should B be estopped from showing that he is not liable? 'A is not the agent of B; B has never held him out as such, yet C is entitled, as between himself and B, to say that A is the agent of B! Why is he so entitled, if the fact is not so, and B has not so represented?' If C knowing of an agreement between A and B that

[36] Elliot v. Stevens, 38 N. H. 311; Kelly v. Scott, 49 N. Y. 595.

[37] 2 Smith's Lead. Cas. (5th Am. ed.), p. 644.

B shall not be liable for debts contracted by A deals with A he has no claim on B. 'Why should he, if he does not know of it? Why, upon finding out something between A and B which has in no way affected or influenced him, should he who has dealt with A have a claim on B' contrary to the intention of both A and B?[88] If the only objection to these agreements is the secrecy, is it not enough to compel the reparation of all damage caused by the secrecy? Because B has caused C to believe in the existence of a certain fact, shall B therefore be estopped to deny the existence of an entirely distinct fact, in the existence of which C never believed? Why should the law impose upon B the performance of a duty which he never undertook, and which C never supposed he had undertaken? A strong argument against the supposed net-profit rule is afforded by the claim to which it legitimately gave rise in Kilshaw v. Jukes.[89] Kilshaw supplied timber to Till & Wynn for houses which they were building. Till & Wynn offered Jukes as a guarantor for the price of the timber, but his security was rejected by Kilshaw. Kilshaw subsequently, having, as he thought, discovered that Jukes was a participator in the net profits of the house-building, sued him as a copartner, thus, in effect, attempting to enforce payment from a man on whom he never relied, and whose guaranty he had expressly refused! Yet, if Jukes had in fact participated in the net profits under an agreement that he should not be liable for debts, we think Kilshaw's claim might well have been supported under the supposed net-profit rule."

§ 63. Argument as to one sharing profits bearing burden fallacious—Eastman v. Clark.—"The maxim, 'qui sentit commodum sentire debet et onus,' is not decisive in favor of the supposed rule. It must be presumed that the secret stipulator for a share of the net profits gives something for the right. (If he does not, there is no consideration, and hence no valid agree-

[88] Bullen v. Sharp, L. R. 1 C. P. 86, 1 H. & R. 117, 35 L. J., C. P. 105, 12 Jur. (N. S.) 247, 14 L. T. 72, 14 W. R. 338.

[89] 3 Best & Smith 847, 32 L. J., Q. B. 217, 9 Jur. (N. S.) 1231.

ment.) If he does pay anything to the ostensible manager, or puts any capital into the concern, he does 'bear a burden;' he runs the risk of losing what he thus pays or puts in. His claim is not enforcible until after all the creditors of the concern are satisfied. Furthermore, notwithstanding this maxim, an agreement to share profits without being liable for debts is not in its nature against the policy of the law. This, as has already been said, is evident from the fact that such agreements, so far as they are known to persons dealing with the concern, are allowed full scope and effect.[40]

It may be said that if this reasoning is right, a man might bargain to receive all the profits of a business and not be liable. The answer is, the thing is impossible. There never was and never will be a bona fide agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colorable.[41] In other words, it would be almost impossible to satisfy a jury that even the form of such an agreement was ever entered into; and, if that fact should be established, the mere making of such an agreement, would under ordinary circumstances, afford cogent evidence of an actual intent to defraud creditors. And participators in that intent would in some form of action (whether in contract or tort is not now material) be held answerable to make good the loss of all who suffered by the conspiracy. We are here dealing only with bona fide agreements. Colorable arrangements will be attempted under any rule or test.

§ 64. Rule not needed to reach an ostensible partner—Eastman v. Clark.—"The supposed 'net-profit rule' is not needed to reach the case of an ostensible partner. He is liable on the elementary principles of the law of estoppel, because he held himself out as a partner. Nor is it needed to reach the case of a dormant partner who was to participate in the profits and

[40] 2 Am. L. Rev. 7, 8, 202; Bailey v. Clark, 6 Pick. (Mass.) 372; Bromley v. Elliott, 38 N. H. 287, 303, 75 Am. Dec. 182.

[41] Bullen v. Sharp, L. R. 1 C. P. 86, 1 H. & R. 117, 35 L. J., C. P. 105, 12 Jur. (N. S.) 247, 14 L. T. 72, 14 W. R. 338.

the losses. He is liable just as any other undisclosed principal is, under the ordinary doctrines of the law of agency. In such a case 'the dormant partner knows he is liable, and means to be.'[42]

"Nor does the repudiation of the supposed rule annihilate the ordinary presumptions of fact. If it appears that B stipulated for a share in the profits of a concern, a jury fairly may, and always will, presume, in the absence of any evidence to the contrary, that he also agreed to be liable for the losses. That is the prima facie inference, justified by common experience. But the supposed 'net-profit rule' goes further, and conclusively presumes that he contracted to pay the debts, in the face of satisfactory evidence that it was expressly stipulated to the contrary. It does not allow him to rebut the presumption. In every case where there is an agreement to participate in the net profits, there is incidentally and to a limited extent a participation in the losses as well as in the profits; for before it can be ascertained that there are any profits, the losses must first be deducted, and the residue only shared as profits.[43] But because a man has subjected himself to this incidental sharing of the losses, why should the law conclusively presume him personally liable to respond for all losses out of his general property?

"It is not the least of the objections to the supposed rule that the hardship of its application to individual cases will lead to the introduction of subtle exceptions to the rule, exceptions 'which aggravate the bulk of the corpus juris, and (what is an evil of still greater magnitude) which reduce the body of the law to a chaos of incoherent details'."[44]

The opinion of Doe, J., in Eastman v. Clark[45] is devoted to a consideration of the English and American cases decided previously, and shows that in many of those decided on the profit-sharing test the same result would have been reached by the application of the test of intention, and also brings out the fact that

[42] Bramwell, B. in L. R. 1 C. P. 126.
[43] Story Partnership, § 600.
[44] 1 Austin Jurisprudence (3 ed.) 483.
[45] 53 N. H. 276, 16 Am. Rep. 192,

the earlier English and American authorities were not so closely wedded to the "net-profit" test as has often been asserted.

§ 65. Intention test followed—Beecher v. Bush.—In the case of Beecher v. Bush,[46] the court held that where one merely hired the use of another's hotel from day to day, paying daily a sum equal to one-third of the gross receipts and gross earnings, there was no partnership. The opinion was delivered by Cooley, J., who approved the decision of Cox v. Hickman, and also that of Eastman v. Clark. He said: "Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option to the extent even of making one the sole agent of the others and of the business.

"If therefore we shall say that agency of each to act for the the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else, is a mere absurdity. The test of partnership must be found in the intent

[46] 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. This case was followed in Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397 and note. In the case of Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776, it was held that a partnership exists if there is a "community of property, community of interest and community of profits." In Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, this holding was limited to the effect that there is no partnership if any of these elements is missing.

of the parties themselves. They may say they intend none when their contract plainly shows the contrary, and in that case the intent shall control the contradictory assertion." * * *

"Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership, and the third persons have not been misled by concealment of facts or by deceptive appearances."

§ 66. Intention test followed—Chaffraix v. Lafitte.—In the case of Chaffraix v. Lafitte,[47] it was held that where a nonresident commercial firm made an agreement with two resident firms, by which one of the resident firms was to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the nonresident firm, was to pay for the merchandise, and each of the resident firms agreed to receive, instead of fixed sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agreed to share in any losses resulting from said sales, such an agreement did not make the firms commercial partners, even as to third persons, when it appeared that they did not intend to form a partnership, and that they did not hold themselves out as partners.

In the opinion by Marr, J., the court said: "Waugh v. Carver is no longer the rule; and other tests must be resorted to in addition to participation in the profits, in order to determine the question of partnership vel non. Participation in the profits is

[47] (1878) 30 La. Ann. 631.

one circumstance; participation in the losses is another. It is demonstrated that participation in the profits alone is not sufficient. The parties may stipulate for a participation in the profits, and that there shall be no partnership; and they may also agree to share profits and losses, and exclude partnership, since there is nothing in liability for losses, an incident of the contract of partnership, which gives it greater significance as a test of that relation than participation in profits, which is also an incident of that contract. Such agreements serve to fix the rights and relations of the parties with respect to each other, and the public, or third persons are not interested in or prejudiced by them, whether they are publicly avowed, or known only to the parties. The true, final, satisfactory, conclusive test is in the answer to the question: What was the real meaning and intention of the parties, as expressed in their contract, whether verbal or written? If they intended to create a partnership, they will be treated as partners inter sese and with respect to third persons; if they did not intend to create that relation, but merely to divide the profits, or to share profits and losses, in a speculation or adventure, they will not be partners inter sese, nor will they be liable as such. Those who hold themselves out to the public as partners, or knowingly permit themselves to be so held out, may not, indeed, be actually partners, if they have not so intended and agreed; but they will be subject to the same liabilities as partners to those who have dealt and given credit on the faith and in consequence of such acts. The secret partner, and the publicly avowed partner, are equally liable, are equally partners, because, in the one case and the other, it is the real intention and the contract which bind them; and the secret partner can escape liability only by the failure of the creditors to discover his true relation to the business."[48]

[48] In this same case, Chaffraix v. Lafitte, 30 La. Ann. 631, the court said, in reference to preceding authorities: "We shall not attempt to analyze the American cases, such of them as hold that he who shares in the profits, or in the profits and losses, is a partner, have simply followed Waugh v. Carver, and the subsequent decisions which rest upon it, which were so long regarded as authoritative and controlling; while such as hold that

§ 67. Common ownership of profits in joint business—Meehan v. Valentine.—In the case of Meehan v. Valentine,[49] the Supreme Court of the United States held that one who loaned money to a partnership secured by promissory notes, bearing interest, with the agreement that he was to be paid one-tenth of the net profits each year of the partnership business, if those profits exceeded the sum loaned, as additional compensation for the loan, was not a partner liable for the debts of the firm. The court, in an opinion by Gray, J., stated that "the rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent." The court reviewed the English cases following Cox v. Hickman, and with reference to these said, "the reference to agency as a test of partnership was

one or both of these tests can not be accepted as conclusive proof of partnership rest upon distinctions equally as arbitrary as the rule in Waugh v. Carver, and are supported by authorities of no less weight. It is to be hoped that the jurisprudence of the United States, like that of Great Britain under the recent decisions, will no longer depend upon arbitrary rules or arbitrary distinctions, but will accept the real intention and contract of the parties as the only safe and conclusive proof of their actual relations, whether inter sese, or as to third persons. Those who have the leisure and the curiosity to trace the conflict in the English and American courts from Waugh v. Carver down, have but to look into Gow, Collyer, Lindley, Story, Parsons, Troubat, any work on partnership, and read the cases cited in support of the harsh rule which ignored intention and contract, and the equally numerous cases by which it was palliated, by ingenious distinctions, until finally it was declared not to be the law of England, and the plain, natural, just, common-sense rule recognized, by which the real intentions and the contracts of parties are restored to that supremacy which they have always maintained in the civil law and in the kindred systems which have sprung from that noble parentage."

[49] (1891) 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972.

unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent. * * * In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than as indicated at the beginning of this opinion, that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive evidence of partnership." The court then said that the evidence did not show either "actual participation in the profits as principal" within the rule as laid down by the court in Berthold v. Goldsmith,[50] or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in Cox v. Hickman and the later English cases.

§ 68. Other American cases opposing net-profit rule.— It was held in Mississippi,[51] that there is not a partnership where

[50] 24 How. (U. S.) 536, 16 L. ed. 762, 764, 765.

[51] Cudahy Packing Co. v. Hibou (1908), 92 Miss. 234, 46 So. 73, 18 L. R. A. (N. S.) 975.

there is an agreement between a debtor and creditor for payment of the debt out of the net profits of the business, and for a division of the profits share and share alike, after the debt is paid, and that profit sharing is not a conclusive test of partnership, but that there must be an intention to carry on a business and share profits as common owners or joint proprietors.

It was held in a Kansas case that participation in profits is only a circumstance to be considered in determining whether a partnership contract has been created.[52]

§ 69. **Sharing profits as such.**—When the test of partnership by sharing of profits is applied, the test is usually qualified by stating that there must be a sharing of profits as such, and it is recognized that there may be a sharing of profits merely as compensation for labor, or in other manners to be later treated as exceptions to the rule.[53]

This is variously interpreted by the courts to mean a proprietary interest in the profits while they remain a part of the undivided stock,[54] a property in or control over the profits while still undivided, that is, an ownership in the profits before and as they accrue, as distinguished from the right to have a certain or uncertain amount paid from the profits, after they have been ascertained and divided,[55] sharing of the profits as common owners,[56] owning profits before they are ascertained and divided.[57] The indefinite sense of the words "profits as such," and the ambiguities and uncertainty occasioned by their use, has been severely criticized in some cases.[58]

[52] Wade v. Hornaday, 92 Kans. 293, 140 Pac. 870.

[53] 3 Kent's Com., p. 25, n. b.; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; Pratt v. Langdon, 12 Allen (Mass.) 544; Warner v. Myrich, 16 Minn. (Gil. 81) 91; McDonald v. Campbell, 96 Minn. 87, 104 N. W. 760 (repudiated); Hodgman v. Smith, 13 Barb. (N. Y.) 302; Caldwell v. Miller, 127 Pa. St. 442, 17 Atl. 983; Miller v. Marx, 65 Tex. 131; Wagner v. Buttles, 151 Wis. 668, 139 N. W. 425.

[54] Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Gibson v. Smith, 31 Nebr. 354, 47 N. W. 1052.

[55] Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766.

[56] Baum v. Stephenson, 133 Mo. App. 187, 113 S. W. 225.

[57] Kelly v. Gaines, 24 Mo. App. 506.

[58] Denny v. Cabot, 6 Metc. (Mass.)

§ 70. Sharing profits but not losses.—Many decisions hold that the parties need not agree to share losses, in order to create a partnership, and that it is sufficient if they enter a relation with an idea of profit under an agreement that there is to be a community of interest in profits as such,[59] that an agreement providing merely for a division of profits and not of losses is a partnership agreement,[60] and that where one party furnishes the capital and the other the services in a business, and they agree to share the profits, but without any reference to losses, it constitutes a partnership.[61] Some cases positively hold that the sharing of losses is not essential to a partnership.[62] It is usually held that an agreement to share profits implies an agreement to bear losses in the absence of a stipulation to the contrary.[63] Participation in the profits of a business raises a presumption of partnership, but this presumption may be rebutted.[64] It has been held that an agreement for traffic in leaseholds and a division of the proceeds thereof, constitutes partnership,[65] and where three persons engaged in a theatrical venture, two to contribute money, all three to share equally in profits, they were held partners.[66] But where a bank agreed to finance a purchase of cotton by a broker, advanced money on bills of lading, drew drafts on the buyers, and then credited the profit to the broker, the broker and the bank were held not to be partners.[67]

82; Bradley v. White, 10 Metc. (Mass.) 303, 43 Am. Dec. 435; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192.

[59] Miller v. Simpson, 107 Va. 476, 59 S. E. 378 (1907), 18 L. R. A. (N. S.) 962 and note.

[60] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[61] Normènt v. Wittmann, 157 App. Div. 708, 142 N. Y. S. 717; Miller v. Simpson, 107 Va. 476, 59 S. E. 378 (1907), 18 L. R. A. (N. S.) 962 and note; Yost v. Critcher, 112 Va. 870, 72 S. E. 594.

[62] Oppenheimer v. Clemmons, 18 Fed. 888; Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; Cothran v. Marmaduke, 60 Tex. 370; Miller v. Simpson, 107 Va. 476, 59 S. E. 378, 18 L. R. A. (N. S.) 962n.

[63] Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596 (1910).

[64] Sawyer v. Burris, 141 Mo. App. 108, 121 S. W. 321 (1909).

[65] Mitchell v. Tonkin, 109 App. Div. 165 (1905), 95 N. Y. S. 669; Simpson v. Summerville, 30 Pa. Super. Ct. 17 (1909).

[66] Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569.

[67] McLean v. City State Bank, 210 Fed. 21, 126 C. C. A. 601.

§ 71. Sharing profits and losses.—It is often considered, in American as well as in English partnership law, whether profit sharing alone is a test of partnership, or whether there must also be a provision for sharing of losses, but as is often the case, owing to the different state laws, the American decisions are more divergent than those in England, and decisions upon the subject, consequently, not of so uniform operation. It has been held[68] that a contract between two parties, whereby A agreed to furnish money to B to finance a contract held by B, and to receive a fixed interest on the money, with a further consideration of a portion of the profits, made them partners, and although there was no stipulation as to A sharing any loss, yet he was liable for any loss. This case, while in a way making profit sharing a test, nevertheless recognized the fact that loss is an essential ingredient, and in fact made the profit sharing raise a conclusive presumption of sharing of loss.

In Iowa it is held that an agreement to share losses is essential to the partnership relation, that a sharing of profits is insufficient.[69] The same rule holds in Alabama.[70] A very concise statement of the rule of sharing profit and loss is given in a Kentucky case,[71] in the syllabus: "Profit sharing is not always a conclusive test of partnership, but an agreement to share both profits and losses always creates a partnership, and it is immaterial if the person furnishing the capital calls the other party to the agreement an agent, as his opinion of their relations will not control as against the fact that they were to share the profits and losses of the business." The same rule was adhered to where there was a contract to buy and sell tobacco and divide net profits or losses,[72] and where one furnished labor and the other capital

[68] Kelley Island Lime &c. T. Co. v. Masterson, 100 Tex. 38, 93 S. W. 427 (1906).

[69] Haswell v. Standring, 152 Iowa 291 (1911), 132 N. W. 417, Ann. Cas. 1912B 1236n; Miller v. Baker, 161 Iowa 136, 140 N. W. 407.

[70] Watson v. Hamilton, 180 Ala. 3, 60 So. 63.

[71] Bowman v. Blanton, 141 Ky. 407, 132 S. W. 1041.

[72] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010 (1909), 28 L. R. A. (N. S.) 190; Bloom v. Farmers' Bank, 30 Ky. L. 159, 97 S. W. 756.

in a timber deal, and agreed to divide both profits and loss;[73] where one was to furnish pine timber and the other labor to manufacture and market turpentine and resin therefrom, each to share in the profits or losses;[74] where there was a joint venture in the purchase and sale of horses;[75] in a business, with an agreement, either express or implied, to share profits or losses;[76] where cranberry producers formed an association, and each agreed to bear his proportionate share of expenses and to share in profits in like proportion;[77] so in a contract between two parties to publish a newspaper and share in profits and losses;[78] in the purchase and sale of live stock,[79] and in the buying, selling and improving of real estate, by parties sharing in the profits and losses,[80] it is usually held that an agreement to share losses may be inferred from an agreement to share profits,[81] or that the law will presume such agreement.[82]

§ 72. Sharing profits and losses held insufficient to constitute a partnership.—Even a participation in both losses and profits of a given business has been held not of necessity to make the participants partners.[83] The Missouri rule is that mere

[73] Doncourt v. Denton, 131 App. Div. 905 (1909), 115 N. Y. S. 1118.

[74] Dawson v. Blitch, 11 Ga. App. 840, 76 S. E. 596.

[75] Steckman v. Galt State Bank, 126 Mo. App. 664 (1907), 105 S. W. 674.

[76] Jones v. Purnell, 5 Pennew. (Del.) 444, 62 Atl. 149 (1905); Miners' Co-op. Assn. v. The Monarch, 2 Alaska 383 (1905).

[77] Briere v. Searls, 126 Wis. 347, 105 N. W. 817.

[78] Brooke v. Tucker, 149 Ala. 96, 43 So. 141.

[79] McNealy v. Bartlett, 123 Mo. App. 58 (1902), 99 S. W. 767.

[80] Ball v. Danton, 64 Ore. 184, 129 Pac. 1032.

[81] Haswell v. Standring, 152 Iowa 291, 132 N. W. 417, Ann. Cas. 1912B 1326n.

[82] Richardson v. Keely (Colo.), 142 Pac. 167.

[83] Lee v. Cravens, 9 Colo. App. 272, 48 Pac. 159; Dwinel v. Stone, 30 Maine 384; Musser v. Brink, 68 Mo. 242; McDonald v. Matney, 82 Mo. 358; A. N. Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Mackie v. Mott, 146 Mo. 230, 47 S. W. 897; State v. Finn, 11 Mo. App. 546; Newberger v. Friede, 23 Mo. App. 631; Rankin v. Fairley, 29 Mo. App. 587; Roper v. Schaefer, 35 Mo. App. 30; Bank of Osceola v. Outhwaite, 50 Mo. App. 124; Martin v. Cropp, 61 Mo. App. 607; Gille Hardw. &c. Co. v. Harrison, 89 Mo. App. 154; Sain v. Rooney, 125 Mo. App. 176, 101 S. W. 1127; Miller v. Simpson, 107 Va. 476, 59 S. E. 378, 18

participation in profits and losses does not of itself constitute a partnership.[84] It was held in a Kansas case,[85] that a sharing of profits is not conclusive evidence of partnership, and may be overborne by other controlling facts, and likewise it has also been held[86] that where one party advanced money to another with which to buy corporate stock, providing for a sharing of profits, but that the purchaser should stand all loss, there was no partnership, virtually holding that profit sharing is not conclusive evidence of, or a test of, partnership. A partnership does not of necessity result from an agreement to divide commissions upon a transaction, where no losses or expenses are contemplated or incurred.[87] An agreement between different steamship companies to pool their earnings and share the net profits, does not constitute a partnership.[88]

§ 73. **Sharing losses only.**—An agreement between several parties under which one shares in the profits but not in the losses, is not a partnership;[89] therefore an agreement between persons having similar causes of action against a village, that they will each bear an equal share of the costs of a test case, does not make them partners.[90]

§ 74. **Exceptions to rule of profit sharing as test of partnership—In general.**—The general rule as to profit sharing

L. R. A. (N. S.) 962n. In the above case it was held that an agreement to share the losses was not necessary to constitute a partnership. But see Haswell v. Standring, 152 Iowa 291, 132 N. W. 417, Ann. Cas. 1912 B 1326n, holding that in Iowa an essential element of a partnership relation is the obligation to share losses also.

[84] A. Graf Distilling Co. v. Wilson, 172 Mo. App. 612, 156 S. W. 23; Ellis v. Brand, 176 Mo. App. 383, 158 S. W. 705.

[85] Weiland v. Sell, 83 Kans. 229 (1910), 109 Pac. 771.

[86] Rosenblatt v. Weinman, 225 Pa. 200 (1909), 74 Atl. 54.

[87] Sain v. Rooney, 125 Mo. App. 176 (1907), 101 S. W. 1127; Montgomery v. Amsler, 57 Tex. Civ. App. 216, 122 S. W. 307 (1909).

[88] White Star Line v. Star Line of Steamers, 141 Mich. 604, 105 N. W. 135, 113 Am. St. 551.

[89] Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Bailey v. Clark, 6 Pick. (Mass.) 372; Lowry v. Brooks, 2 McCord (S. Car.) 42.

[90] Carter v. Carter, 28 Ill. App. 340.

being a test of partnership, even in the jurisdictions which hold most strongly to it, is subject to certain exceptions. In the noted New York case of Leggett v. Hyde, one of the leading cases upholding the above general rule as to participation in profits (and losses) being the test, certain exceptions are expressly mentioned. "There have been," said the court, "from time to time certain exceptions established to this rule (profit sharing) in a broad statement of it. But the decisions by which these exceptions have been set up still recognize the rule, that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker, or employer, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits;[91] or with seamen on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage. There are other exceptions, as in case of tenants of land, or a ferry or an inn, who are to share with the owners in results, as a means of compensation for their services. The decisions which establish these exceptions do not profess to abrogate the rule—only to limit it. Wessels v. Weiss[92] not only recognizes that there are certain exceptions, but styles these exceptions as "almost as ancient as the rule itself, which was made to avoid the injustice of its universal enforcement."[93] Chancellor Kent, in his Commentaries,[94] says that, "the test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services," and this statement should be kept in mind, as it is a correct and concise statement of the law where this principle is established. It furthermore, in a few words, covers the field of exceptions above given. It might here be said that, although they are often spoken

[91] Leggett v. Hyde, 58 N. Y. 272 (1874). 47 How. Pr. 524, 17 Am. Rep. 244.

[92] 166 Pa. St. 490, 31 Atl. 247 (1895).

[93] See also Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745 (1889)

[94] Vol. 3, p. 25, n. v.

of as exceptions to the general rule, as a matter of fact it would be more correct to speak of them as apparent exceptions, as they simply explain the meaning of the word "profits" as used in this connection. Keeping this in mind, some American cases are cited, which touch upon these apparent exceptions.

§ 75. Exceptions—Sharing of profits as compensation for services.—It is well settled that the receipt by one of a share of the profits of a business or venture as compensation for his services in such business or enterprise does not ipso facto constitute him a partner therein.[95] In New York, which has adhered to the profit sharing test, it is recognized that when one is inter-

[95] Hambly v. Bancroft, 83 Fed. 444; Gentry v. Singleton, 128 Fed. 679, 63 C. C. A. 231; Moore v. Smith, 19 Ala. 774; Zuber v. Roberts, 147 Ala. 512, 40 So. 319; Olmstead v. Hill, 2 Ark. 346; Gardenhire v. Smith, 39 Ark. 280; Dawson Nat. Bank v. Ward, 120 Ga. 861, 48 S. E. 313; Falk v. La Grange Cigar Co. (Ga. App.), 84 S. E. 93; Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906; Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Fuqua v. Massie, 95 Ky. 387, 15 Ky. L. 849, 25 S. W. 875; Graham v. Swann, 148 Ky. 608, 147 S. W. 11; Cline v. Caldwell, 4 La. 137; McWilliams v. Elder, 52 La. 995, 27 So. 352; Holden v. French, 68 Maine 241; Sangston v. Hack, 52 Md. 173; Phipps v. Little, 213 Mass. 414, 100 N. E. 615; Blanchard v. Coolidge, 22 Pick. (Mass.) 151; Harris v. Threefoot (Miss.), 12 So. 335; Ætna Ins. Co. v. Bank of Wilcox, 48 Nebr. 544, 67 N. W. 449; Whitney v. Gretna State Bank, 50 Nebr. 438, 69 N. W. 933; Agnew v. Montgomery, 72 Nebr. 9, 99 N. W. 820; Atherton v. Tilton, 44 N. H. 452; Hargrave v. Conroy, 19 N. J. Eq. 281; Lewis v. Greider, 49 Barb. (N. Y.) 606; Grapel v. Hodges, 112 N. Y. 419, 20 N. E. 542; Smith v. Dunn, 44 Misc. (N. Y.) 288, 89 N. Y. S. 881; American Seeding Mach. Co. v. John Conklin's Sons Co., 64 Misc. 652, 120 N. Y. S. 592 (judgment affd. (Sup. 1911), 145 App. Div. 950, 130 N. Y. S. 1104); Lance v. Butler, 135 N. Car. 419, 47 S. E. 488; Ryder v. Jacobs, 182 Pa. St. 624, 38 Atl. 471; Potter v. Moses, 1 R. I. 430; State v. Hunt, 25 R. I. 69, 54 Atl. 773; Mann v. Taylor, 5 Heisk. (Tenn.) 267; Southworth v. Thompson, 10 Heisk. (Tenn.) 10; Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 S. W. 6; Heidenheimer's Exrs. v. Walthew, 2 Tex. Civ. App. 501, 21 S. W. 981; Morgan v. Stearns, 41 Vt. 398; Wilkinson v. Jett, 7 Leigh (Va.) 115, 30 Am. Dec. 493; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252; Tyler v. Teter (W. Va.), 83 S. E. 906; La Flex v. Burss, 77 Wis. 538, 46 N. W. 801; Sohns v. Sloteman, 85 Wis. 113, 55 N. W. 158; Wagner v. Buttles, 151 Wis. 668, 139 N. W. 425.

ested in the profits only as compensation for services rendered or money advanced, he is not a partner.[96] An agreement whereby a ship captain is to be compensated for his services by a share in the profits of the voyage does not make him a partner.[97] Nor does an agreement to accept, for services rendered, part payment from the profits of the business constitute the employé a partner.[98] A person employed to take charge of a mill, with a percentage of the profits for his services, does not thereby become liable as a partner with the owner for losses which may occur.[1] An acrobat entered into a contract to act under the direction of the other party to the contract. The other party had an exclusive option upon the acrobat's services, to meet expenses of production, and to give the acrobat one-half the profits. It was held not to be a contract of partnership, but of employment.[2] The same rule has been adhered to when a party had simply an

[96] Larzelere v. Taber, 119 App. Div. 81, 103 N. Y. S. 970. In this case it was said: "It is quite true that our courts have adhered to the rule of Waugh v. Carver, 2 H. Bl. 235, refusing to follow the English departure therefrom in Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47, (Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244); and hence the division of profits is regarded as the 'most important element' in consideration of the contracts between the parties (Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745), but that element is not exclusive and controlling. I think that this case may be brought within the principle of Cassidy v. Hall, 97 N. Y. 159, that, when one is interested in the profits only as compensation for services rendered or money advanced, he is not a partner." Johnson v. Alexander, 46 App. Div. 6, 61 N. Y. S. 351 (affd. on opinion below in 167 N. Y. 605, 60 N. E. 1113).

[97] Coffin v. Jenkins, Fed. Cas. No. 2948, 3 Story (U. S.) 108; Brown v. Hicks, 24 Fed. 811; Baxter v. Rodman, 3 Pick. (Mass.) 435; Grozier v. Atwood, 4 Pick. (Mass.) 234; Rice v. Austin, 17 Mass. 197; Mair v. Glennie, 4 M. & S. 240. As to when a partnership may exist in such case, see Bulfinch v. Winchenbach, 3 Allen (Mass.) 161; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766.

[98] Porter v. Curtis, 96 Iowa 539, 65 N. W. 824; St. Victor v. Daubert, 9 La. 314, 29 Am. Dec. 447; Stockman v. Mitchell, 109 Mich. 348, 67 N. W. 336; Morrow v. Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; Breman Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Glore v. Dawson, 106 Mo. App. 107, 80 S. W. 55; Nutting v. Colt, 7 N. J. Eq. 539; Cornell v. Redrow, 60 N. J. Eq. 251, 47 Atl. 56; Miller v. Bartlet, 15 Serg. & R. (Pa.) 137.

[1] Jackson v. Haynies Admr., 106 Va. 365 (1907), 56 S. E. 148.

[2] Keith v. Kellerman, 169 Fed. 196 (1909).

interest in profits as compensation for services, without title to any property or liability for debts,[3] where a party received an interest in net profits, in addition to a weekly salary;[4] where one party furnished sheep, and the other gave his services in tending and managing them;[5] where one party placed his lands in the hands of the other for sale, the latter to have a certain percentage of the selling price to a certain sum, and after the certain sum was reached, then a larger percentage on profits;[6] where there was an agreement for managing a lumber business upon a salary and percentage of net profits;[7] where one party furnished money to build houses and renders legal services, with an agreement for payment of loan with interest and a further participation in profits, if any;[8] where a person was employed for a certain amount per diem by a corporation to manage the business of the corporation, and as additional compensation, half of the net profits of the business;[9] where one party furnishes cows and the other party milks and cares for them, and has therefore one-half the proceeds of the cream, calves and skimmed milk;[10] where one party took a lease of a quarry, and engaged the other party to manage the quarry and commissary, agreeing to give the second party one-half the profits of the quarry and commissary, and one-half the rents of houses on the property;[11] when there is an agreement by one person to give another one-half the profits arising from the purchase and sale of stock, as compensation for the second party's services in buying the stock;[12] where an individual got out rock asphalt and shipped it to a company which used it in

[3] Lyden v. Spohn-Patrick Co., 155 Cal. 177 (1909), 100 Pac. 236.

[4] Street v. Thompson, 229 Ill. 613 (1907), 82 N. E. 367.

[5] Johnston v. Steele, 48 Tex. Civ. App. 335, 107 S. W. 631 (1908).

[6] Corbin v. Holmes, 154 Fed. 593, 83 C. C. A. 367 (1907).

[7] Van Duzer v. W. F. Zimmerman Lumber Co. (Miss.), 43 So. 177 (1907).

[8] Larzelere v. Taber, 119 App. Div. 81 (1907), 103 N. Y. S. 970.

[9] Belch v. Big Store Co., 46 Wash. 1, 89 Pac. 174 (1907).

[10] Phillips v. Mires, 2 Cal. App. 274, 83 Pac. 300 (1905).

[11] Zuler v. Roberts, 147 Ala. 512, 40 So. 319 (1906).

[12] Mingus v. Bank of Ethel, 136 Mo. App. 407 (1909), 117 S. W. 683.

street paving, upon an equal division of profits;[13] where a building contractor paid his superintendent a salary and as a bonus a share of the profits of the contract;[14] and in many other cases where a contractor has agreed with employés or those furnishing services to him that they shall have a share in the profits.[15] Where an agent is paid by a share in the profits;[16] where the superintendent of a manufacturing plant received half the profits;[17] where a storekeeper gave another twenty per cent. of the profits to attend to the business and do the buying;[18] where a contract provided for a salary of one hundred twenty-five dollars per month and half the profits over three thousand dollars per year;[19] where an employé of a piano dealer, owning no stock and bearing no expenses, received part of the profits of a special sale;[20] where one procured a contract in the name of, and for the exclusive benefit of, another, he to share equally in the profits of the contract as consideration for his services.[21] An excellent statement of the principle is made in a Massachusetts case[22]—as given in the following syllabus: "Where there is an arrangement between two persons that one of them shall receive a part of the profits of the business conducted by the other, whether they are partners is to be determined by whether he has a share or interest in the profits as profits, or whether his interest in the profits is merely as a measure of his compensation for something that he does or furnishes under a contract." A similar rule is advanced in the case of Langley v. Sanborn.[23] As a general rule, it is held that

[13] Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[14] Bankers' Surety Co. v. Maxwell, 222 Fed. 797.

[15] Carpenter v. Lennane, 166 Mich. 610, 132 N. W. 477; In re Whitlow's Estate, 184 Mo. 229, 167 S. W. 463; Burns v. Niagara &c. Power Co., 145 App. Div. 280, 130 N. Y. S. 54.

[16] Studebaker Corp. v. Dodds, 161 Ky. 542, 171 S. W. 167.

[17] Hartwell v. Becker, 181 Mo. App. 408, 168 S. W. 837.

[18] O'Marrow v. State (Tex. Cr. App.), 147 S. W. 252.

[19] Goodin v. Pitt, 36 Nev. 156, 134 Pac. 459.

[20] McBrayer v. Smith (Tex. Civ. App.), 145 S. W. 1053.

[21] Tyler v. Teter (W. Va.), 83 S. E. 906.

[22] Estabrook v. Woods, 192 Mass. 499, 78 N. E. 538 (1906).

[23] 135 Wis. 178, 114 N. W. 787 (1908).

a partnership exists when persons share in the profits of an enterprise as profits, and not as a measure of compensation for services, property, or opportunity in aid of the business.[24] These principles apply to third persons, as well as the parties to the agreement, when the employé has not been held out as a partner and is not estopped to deny a partnership liability.[25] It must be borne in mind, however, that one who accepts a part of the profits in lieu of a salary may be a partner, and in many cases it is difficult to determine whether such a person is in fact an employé or partner. Each case must be determined by the facts and circumstances peculiar to it. Thus where an owner of timber and another made an agreement for the owner to furnish timber for manufacture, sell the product and collect the proceeds, while the other was to cut, log, and manufacture and receive two-thirds of the proceeds, it was held a partnership.[26]

Courts have also held there were partnerships, where a broker, the agent for the sale of timber, entered into an arrangement with another to purchase the timber, and build a sawmill, and the profits to be divided;[27] where there was an agreement to conduct a grocery business, one to furnish the money, buy merchandise and equipment, lease the premises in his name and take title, each to receive eighty-five dollars a month salary, the profits to go three-fourths to the one who furnished the money, one-fourth to the other;[28] and where a construction company made

[24] Lacotts v. Pike's Est., 91 Ark. 26, 120 S. W. 144; Morgart v. Smouse, 112 Md. 615 (1910), 77 Atl. 137; Wagner v. Buttles, 151 Wis. 668, 139 N. W. 425.

[25] Hodges v. Dawes, 6 Ala. 215; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; Burton v. Goodspeed, 69 Ill. 237; Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103; Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; Shepard v. Pratt, 16 Kans. 209; Chaffraix v. Lafitte, 30 La. Ann. 631; Bradley v. White, 10 Metc. (Mass.) 303, 43 Am. Dec. 435; Hall v. Edson, 40 Mich. 651; Carpenter v. Leunave, 166 Mich. 610, 132 N. W. 477; Wiggins v. Graham, 51 Mo. 17; Voorhees v. Jones, 29 N. J. L. 270; Fitch v. Hall, 25 Barb. (N. Y.) 13; Edwards v. Tracy, 62 Pa. St. 374; Polk v. Buchanan, 5 Sneed. (Tenn.) 721; Goode v. McCartney, 10 Tex. 193; Bowman v. Bailey, 10 Vt. 170.

[26] Murphy v. Fairweather, 72 W. Va. 14, 77 S. E. 321.

[27] Smith v. Padrosa, 139 Ga. 484, 77 S. E. 639.

[28] Donleavey v. Johnston, 24 Cal. App. 319, 141 Pac. 229.

a contract with one that he should manage the work of construction of a building then under contract, should make advances not to exceed eight hundred dollars to pay labor, receive an equal allowance with the contractors for personal services, should have net profits, and be repaid his advances if the contract was a success.[29]

§ 76. **Sharing profits as compensation eo nomine.**—It was formerly held that if one shared in the profits of a business eo nomine as compensation for services, he was liable as a partner, and to escape being held as a partner it must be expressly stipulated that he was to receive, not a share of profits, but a sum equal to a certain share.[30] It is still held in Pennsylvania that while a share in the profits of a transaction may constitute the person thus sharing a partner, the receipt of a commission equal to such share as compensation for services does not.[31] In a Connecticut case, Parker v. Canfield,[32] where an agreement in express terms gave a sum of money equal to a share of the profits, not as profits, but as a compensation for procuring capital, said, "It can make no difference with creditors, whether a sum equal to the * * * profits is taken, or the same share of the profits is taken eo nomine. The fund on which the creditors rely is affected to the same extent and in the same manner under the one form of expression as under the other." And it was held that where a share of profits was paid to a person as compensation for service, it is the nature of the contract, and the nature of the consideration on which the promise to pay a part of profits

[29] Styers v. Stirrat, 65 Wash. 676, 118 Pac. 896.

[30] In re Pierson, 10 Nat. Banks Reg. 107, Fed. Cas. No. 11, 153; Omaha Smelting &c. Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 853; Loomis v. Marshall, 12 Conn. 70, 30 Am. Dec. 596; Emmons v. Newman, 38 Ind. 372; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; Turner v. Bissell, 14 Pick. (Mass.) 192; Purviance v. McClintee, 6 Serg. & R. (Pa.) 259; Miller v. Bartlett, 15 Serg. & R. (Pa.) 137; Ex parte Rowlandson, 2 Ves. & B. 172, 1 Rose 89, 13 R. R. 52; Ex parte Hamper, 17 Ves. 412, 11 R. R. 115; Pott v. Eyton, 3 C. B. 32, 15 L. J., C. P. 257.

[31] In re De Haven's Est., 248 Pa. 271, 93 Atl. 1013.

[32] Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 320.

is founded, that prevents his being a partner, and not the use of a particular phrase in his agreement. So in nearly all the later cases in which the question has arisen, the courts have virtually held to the rule announced in the case of Parker v. Canfield, and have looked to the real nature of the transaction, and the real consideration for the share of profits.[33]

§ 77. **Sharing profits as fee or commission.**—A further exception to the rule that profit sharing constitutes a partnership is found where parties agree to a division of fees and commissions. Thus an agreement whereby a real estate agent or broker contracts to divide his commission with another person who finds a purchaser for the property does not constitute a partnership, but only an agency.[34] Nor does an agreement whereby lawyers contract to divide their fees with certain persons who bring them business constitute them partners in the general practice of law.[35] Nor does the mere fact that two or more parties undertake the joint performance of a contract with a division of the contract price necessarily constitute them partners,[36] nor that a commission equal to the share of a partner was paid for services.[37]

[33] Stafford v. Sibley, 106 Ala. 189, 17 So. 324; Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103; Donley v. Hall, 5 Bush (Ky.) 549; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Buzard v. First Nat. Bank, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7.

[34] Allen v. Hudson, 78 Ill. App. 376; Wass v. Atwater, 33 Minn. 82, 22 N. W. 8; Sain v. Rooney, 125 Mo. App. 176, 101 S. W. 1127; Brackenridge v. Claridge (Tex. Civ. App.), 42 S. W. 1005; Jones v. Murphy, 93 Va. 214, 24 S. E. 825.

[35] Heshion v. Julian, 82 Ind. 576. See also Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Wheeler v. Lack, 37 Ore. 238, 61 Pac. 849; Southworth v. Thompson, 10 Heisk. (Tenn.) 10; Logie v. Black, 24 W. Va. 1.

[36] Matthews v. J. H. Luers Drug Co., 110 Iowa 231, 81 N. W. 464; Herbert v. Callahan, 35 Mo. App. 498; Hawkins v. McIntyre, 45 Vt. 496. But see Brandon v. Connor, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Voorhees v. Jones, 29 N. J. L. 270. See also Burns v. Niagara &c. Power Co., 145 App. Div. (N. Y.) 280, 130 N. Y. S. 54.

[37] In re De Haven's Estate, 248 Pa. 271, 93 Atl. 1013.

§ 78. Sharing profits as a royalty.—It has been held that where inventions and business are sold upon a royalty of a certain per cent. of the net profits of the business that there is no partnership between the parties, as the percentage of the profits is simply a method of computing the royalty, and not an agreement to share profits as such.[38]

§ 79. Profit sharing as payment of rental.—The mere fact that one receives a part of the profits of a business or enterprise as compensation for property, real or personal, furnished for use in a profit-producing business does not as a general rule make such party a partner or create a partnership liability.[39] Thus, if a landlord rents his real estate, his buildings or appurtenances to another, and in lieu of a cash rent agrees to accept a per cent. of the tenant's profit, a partnership is not thereby formed unless the landlord has some direct interest as principal in the business conducted by the tenant.[40] The same principle

[38] Thomson v. Batcheller, 134 App. Div. 506 (1909), 119 N. Y. S. 577.

[39] Nelms v. McGraw, 93 Ala. 245, 9 So. 719; Gulf City Shingle Mfg. Co. v. Boyles, 129 Ala. 192, 29 So. 800; Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Fougner v. First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Pierpont v. Lanphere, 104 Ill. App. 232; Robbins v. McKnight, 5 Hals. (N. J. Eq.) 642, 45 Am. Dec. 406; American Seeding Mach. Co. v. John Conklin's Sons Co., 64 Misc. (N. Y.) 652, 120 N. Y. S. 592; affd. 145 App. Div. (N. Y.) 950, 130 N. Y. S. 1104 (money advanced); England v. England, 1 Baxt. (Tenn.) 108.

[40] Randle v. Barnard, 81 Fed. 682, 26 C. C. A. 568, 53 U. S. App. 377; May v. International Loan &c. Co., 92 Fed. 445, 34 C. C. A. 448, 63 U. S. App. 773; McDonnell v. Battle House Co., 67 Ala. 90, 42 Am. Rep. 99; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; Keiser v. State, 58 Ind. 379; Reed v. Murphy, 2 G. Greene (Iowa) 574; Randall v. Ditch, 123 Iowa 582, 99 N. W. 190; Russell v. Gray, 4 Ky. L. 619; Fuqua v. Massie, 95 Ky. 387, 15 Ky. L. 849, 25 S. W. 875; Holmes v. Old Colony R. Corp., 5 Gray (Mass.) 58; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Thayer v. Augustine, 55 Mich. 187, 20 N. W. 898, 54 Am. Rep. 361; Perrine v. Hankinson, 11 N. J. L. 181; Austin v. Neil, 62 N. J. L. 462, 41 Atl. 834, which follows Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552, and disapproves Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; Bigelow v. Elliot, 1 Cliff. (U. S.) 28. Fed. Cas. No. 1399; Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; Dake v. Butler, 7 Misc. (N. Y.) 302, 58 N. Y. St. 550, 28 N. Y. S. 134; Dunham

applies[41] where a ship, franchise,[42] live stock[43] or other property, is hired or leased to another, payment to be made in profits. The lessor and lessee, or bailor and bailee, are not for that reason alone considered as partners.

Rentals are often paid by basing the rental upon the income, either gross or net. In one case,[44] a hotel was leased by the owner to a tenant, the rental agreed upon being a percentage of the total gross receipts, the lessee to pay all operating expenses from his portion. There was no partnership, as there was no sharing of profits as such, but only a payment of rent, based upon profits. The same rule has been recognized where the rental was based upon net profits, and no partnership held.[45] Where the owner of a ginhouse turned its management over to another, the owner not to share losses, but to be paid for its use half the net profits, it was held there was no partnership, even as to third persons;[46] a similar rule was applied where one leased

v. Rogers, 1 Pa. St. 255; Ambler v. Bradley, 6 Vt. 119; Boyer v. Anderson, 2 Leigh (Va.) 550; Z. C. Miles Co. v. Gordon, 8 Wash. 442, 36 Pac. 265; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766.

[41] Thompson v. Snow, 4 Greenl. (Maine) 264, 16 Am. Dec. 263; Bridges v. Sprague &c. Iron Co., 57 Maine 543, 99 Am. Dec. 788; Holden v. French, 68 Maine 241; Reynolds v. Toppan, 15 Mass. 370, 8 Am. Dec. 110; Cutler v. Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385; Bowman v. Bailey, 10 Vt. 170; Tobias v. Blin, 21 Vt. 544.

[42] Heimstreet v. Howland, 5 Denio (N. Y.) 68; Hanthorn v. Quinn, 42 Ore. 1, 69 Pac. 817; Bowyer v. Anderson, 2 Leigh (Va.) 550.

[43] Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Rider v. Hammell, 63 Kans. 733, 66 Pac. 1026; A. N. Kellogg &c. Co. v. Farrell, 88 Mo. 594; W. D. Wilson Printing &c. Co. v. Bowker, 27 Abb. N. Cas. (N. Y.) 153, 39 N. Y. St. 690, 15 N. Y. S. 293; Murray Ginning System Co. v. Exchange Nat. Bank (Tex. Civ. App.), 61 S. W. 508; Emberson v. McKenna, 4 Wills. Civ. Cas. Ct. App. (Tex.) § 94, 16 S. W. 419. See, however, Green v. Beesby, 2 Scott 164, 2 Bing. N. Cas. 108, 1 Hodges 199, 4 L. J., C. P. 299; Dalton City Co. v. Dalton Mfg. Co., 33 Ga. 243; Dalton City Co. v. Hawes, 37 Ga. 115; Brandon v. Conner, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Buckner v. Lee, 8 Ga. 285; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Clinton Bridge &c. Works v. First Nat. Bank, 103 Wis. 117, 79 N. W. 47.

[44] Drilling v. Armstrong, 94 Ark. 505, 127 S. W. 725 (1910).

[45] Weiland v. Sell, 83 Kans. 229 (1910), 109 Pac. 771.

[46] Hall v. Stone (Ga. App.), 75 S. E. 140.

well-drilling machinery agreeing to pay the lessor ninety per cent. of the profits.[47]

§ 80. Profit sharing as interest.—It will be remembered that the rule established in England by the case of Grace v. Smith,[48] making profit sharing the test of partnership, was arrived at in some of the early cases, very largely to eliminate the question of usury, and yet at the present time many jurisdictions bring the sharing of profits as interest within the exceptions to the general rule, thus making the cause of a legal principle an exception to it. The argument that one loaning money who takes part of the profits should be held a partner to escape holding him a usurer, is severely attacked in some cases.[49] The rule is that if one merely loans money to the proprietor of a business he is not a partner, although he may have received a share of the profits as compensation, there being no distinction between compensation for the use of money, and compensation for services,[50] but if one really invested capital in the business for a share of profits, he is held a partner, at least as to third persons.[51] This

[47] McKallip v. Geese, 30 Okla. 33, 118 Pac. 586.

[48] 2. W. Bl. 999.

[49] Smith, J., in Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192, quoted in § 81 post.

In Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267, Miller, J., said: "If the contract was usurious, then it was a loan of money, and it is not manifest how the plaintiff can avail himself of the usury to recover in this action."

[50] Wilson v. Edmonds, 130 U. S. 472, 32 L. ed. 1025, 9 Sup. Ct. 563; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; Stevens v. McKibbin, 68 Fed. 406, 15 C. C. A. 498, 30 U. S. App. 363; Buford v. Lewis, 87 Ark. 412, 112 S. W. 963; Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836; Fougner v. First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Darling v. Potts, 118 Mo. 506, 24 S. W. 461; Hunter v. Conrad, 18 Mont. 177, 44 Pac. 523; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; American Seeding Mach. Co. v. John Conklin's Sons Co., 64 Misc. (N. Y.) 652 (1909), 120 N. Y. S. 592 (affd. 145 App. Div. 950, 130 N. Y. S. 1104); Keogh v. Minrath, 56 Hun 640, 30 N. Y. St. 129, 8 N. Y. S. 816 (affd. 130 N. Y. 677, 29 N. E. 1035); Palliser v. Erhardt, 46 App. Div. 222, 61 N. Y. S. 191; Lord v. Proctor, 7 Phila. (Pa.) 630; Hart v. Kelley, 83 Pa. St. 286.

[51] Buford v. Lewis, 87 Ark. 412, 112 S. W. 963; Plunkett v. Dillon, 4 Houst. (Del.) 338; Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; Reynolds v. Hicks, 19 Ind. 113; Illi-

rule calls for a distinction often difficult to make, i. e., between a loan and an investment in capital. A New York case holds that one interested only in the profits of a business as a means of compensation for money advanced is not a partner. Another case in the same state[52] held, that where a capitalist furnished a lumber owner money to enable him to carry on his business, and was to receive back the money advanced, and also one-third of the net profits of the enterprise, it did not constitute these parties partners.[53] In that state the courts have made close distinctions, in two cases holding persons partners, who received profits because of moneys advanced,[54] while several cases decided in the interim between these two held to the opposite rule, which seems to have been also followed in the more recent cases.[55] If there is really an investment of capital in a business, the mere fact that the parties called it a loan, does not change its legal effect.[56]

In a Minnesota case, where one needing financial assistance to complete a contract, applied to another, and they agreed that the other should advance twenty thousand dollars to the contractor to carry on the business then in operation partly under the contract, and the lender was to manage the finances of the business, his advances to be repaid out of the first proceeds of the business after taking care of expenses and contracts, and he was to receive half the net profits of the business, the contractor to give his time to the general management, the agreement to last

nois Malleable Iron Co. v. Reed, 102 Iowa 538, 71 N. W. 423; Wood v. Vallette, 7 Ohio St. 172; note 18 L. R. A. (N. S.) 1047; Purvis v. Butler, 87 Mich. 248, 49 N. W. 564; Fouke v. Brengle (Tex. Civ. App.), 51 S. W. 519.

[52] Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599 (1906), 98 N. Y. S. 766.

[53] Contra: Kirkwood v. Smith, 47 Misc. (N. Y.) 301 (1905), 95 N. Y. S. 926.

[54] Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Leggett v. Hyde, 58 N. Y. 272, 47 How. Pr. 524, 17 Am. Rep. 244.

[55] Rechardson v. Hughitt, 76 N. Y. 55. 32 Am. Rep. 267; Eager v. Crawford, 76 N. Y. 97; Burnett v. Snyder, 76 N. Y. 344; Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343; Cassidy v. Hall, 97 N. Y. 159.

[56] Wood v. Vallette, 7 Ohio St. 172; Poundstone v. Hamburger, 139 Pa. St. 319, 20 Atl. 1054.

during the logging season of two years, and the lender's advances to draw six per cent. interest, and no inventory was taken of the business nor nothing said about a partnership nor lending money, nor terms of payment, nor giving of notes, except an assignment of the contract to the lender as security, and the business continued to be conducted by the contractor in his own name, except part of the bank accounts were in the lender's name, who did not hold himself out as a partner, it was held there was no partnership.[57]

§ 81. Sharing gross receipts.—It has sometimes been held that the sharing of gross returns makes the participants partners.[58] It has been said that participation in gross returns is not a participation in profits as profits, but Smith, J., in Eastman v. Clark,[59] says that the reason of the net-profit rule applies with greater force to the sharer of gross returns, that if the one who shares in net profits takes from creditors part of the fund on which they rely for payment, much more does he who shares in gross returns, that if the net-profit rule is founded in reason, it is inconsistent not to hold liable the sharer of gross returns. This reasoning seems conclusive, but the general rule is, and has been, that agreements to divide products or to share in gross returns do not create a partnership.[60] This rule especially holds good where the owner of raw material agrees with the manufacturer who makes it into a finished product to pay him a share of such product.[61] However, such cases as these could easily be dis-

[57] T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; O'Brien Mercantile Co. v. McKinley, 114 Minn. 521, 131 N. W. 319.

[58] Everitt v. Chapman, 6 Conn. 347; Wadsworth v. Manning, 4 Md. 59; Musier v. Trumpbour, 5 Wend. (N. Y.) 275; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64.

[59] 53 N. H. 276, 16 Am. Rep. 192, quoted in § 58 ante.

[60] Clark v. Barnes, 72 Iowa 563, 34 N. W. 419; Pattison v. Blanchard, 5 N. Y. 186; Cogswell v. Wilson, 11 Ore. 371, 4 Pac. 1130; Butterfield v. Lathrop, 71 Pa. St. 225; Houston &c. R. Co. v. McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593.

[61] Nelms v. McGraw, 93 Ala. 245, 9 So. 719; Loomis v. Marshall, 12 Conn. 70, 30 Am. Dec. 596; Hodges v. Rogers, 115 Ga. 951, 42 S. E. 251; Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; Lafon v. Chinn, 6 B. Mon. (Ky.) 306; Edwards v. Fairbanks, 27 La. Ann. 452; Turner v. Bissell, 14

posed of as coming under the exception of compensation for services.

It is also said that an agreement to share the gross returns of a joint venture creates merely a debt, not a joint ownership of the profits, and does not constitute a partnership.[62] It has been held, regardless of the question as to whether or not there is a common interest in the property bringing the returns, the sharing of gross returns does not of itself create a partnership.[63] The Uniform Partnership Act provides: "The receipt of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."[64]

§ 82. Right to demand accounting.—It has sometimes been said that a sharer in profits ought to be held liable as a partner for the reason that he may bring an action in equity for an account of the profits in order to fix the amount which comes to him. But it is not only a partner who has a right to ask for an accounting.[65]

§ 83. Modified statement of profit-sharing test.—Up until the year 1860 there was one test almost universally applied by which to determine the existence of a partnership. That test was: if the parties share in the profits of a business or transaction they are partners, at least as to third persons.[66] It is now well recognized that although one shares in the profits of a busi-

Pick. (Mass.) 192; Michener v. Fransham, 33 Mont. 108, 81 Pac. 953; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Clement v. Hadlock, 13 N. H. 186; Clark v. Smith, 52 Vt. 529.

[62] Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445.

[63] Tyson v. Bryan, 120 N. W. 940, 84 Nebr. 202 (1909).

[64] Uniform Partnership Act, § 7, cl. 3.

[65] Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192-249, quoted in § 58 ante; Story Partnership, § 50n; Collyer Partnership, § 45n; 2 Lindley Partnership, § 946.

[66] Waugh v. Carver, 2 H. Bl. 235; Grace v. Smith, 2 W. Bl. 1000; Heyhoe v. Burge, 9 C. B. 431, 19 L. J., C. P. 243; Hesketh v. Blanchard, 4 East 143; Hawley v. Dixon, 7 U. C. Q. B. 218; Bank of Nova Scotia v. Haliburton, 2 N. S. 350; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; In re Neasmith, 147 Fed. 160, 77 C. C. A. 402; Oppen-

ness he is not necessarily a partner for that reason alone.[67] A general realization of the many exceptions which exist to the profit-sharing test and its consequent untrustworthiness has led to its modification. In its modified form the rule is usually stated thus: "Two or more persons who contract together to carry on a business and share in the profits as common owners thereof are partners."[68] In other words, in order to constitute one a partner his right to share in the profits must result from

heimer v. Clemmons, 18 Fed. 886; Emanuel v. Draughn, 14 Ala. 303; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 320; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Plunkett v. Dillon, 4 Houst. (Del.) 338; Brandon v. Connor, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260; Buckner v. Lee, 8 Ga. 285; Niehoff v. Dudley, 40 Ill. 406; Hubbell v. Woolf, 15 Ind. 204; Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Craig v. Alverson, 6 J. J. Marsh. (Ky.) 609; Bank of Tennessee v. McKeage, 11 Rob. (La.) 130; Robertson v. DeLizardi, 4 Rob. (La.) 300; New Orleans v. Gauthreaux, 32 La. Ann. 1126; Pratt v. Langdon, 97 Mass. 97, 93 Am. Dec. 61; Sager v. Tupper, 38 Mich. 258; Connolly v. Davidson, 15 Gil. (Minn.) 428, 2 Am. Rep. 154; Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918; Mason v. Hackett, 4 Nev. 420; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370; Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Heimstreet v. Howland, 5 Denio (N. Y.) 68; Hodgman v. Smith, 13 Barb. (N. Y.) 302; Leggett v. Hyde, 58 N. Y. 272, 47 How. Pr. (N. Y.) 524, 17 Am. Rep. 244; Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Southern Fertilizer Co. v. Reames, 105 N. Car. 283, 11 S. E. 467 and note; Cossack v. Burgwyn, 112 N. Car. 304, 16 S. E. 900; Aspinwall v. Williams, 1 Ohio 84; Second Nat. Bank v. Second Nat. Bank, 13 Ohio C. C. 561; Wood v. Vallette, 7 Ohio St. 172; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Edwards v. Tracy, 62 Pa. St. 374; Bartlett v. Jones, 2 Strob. (S. Car.) 471, 49 Am. Dec. 606; Cothran v. Marmaduke, 60 Tex. 370; Chapman v. Devereux, 32 Vt. 616; Brigham v. Dana, 29 Vt. 1; Kellogg v. Griswold, 12 Vt. 291; Brown's Exr. v. Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618. See also Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47; Bullen v. Sharp, L. R. 1 C. P. 86, 1 H. & R. 117, 35 L. J., C. P. 105, 12 Jur. (N. S.) 247, 14 L. T. 72, 14 W. R. 338; Cox v. Delano, 14 N. Car. 89.

[67] Lacotts v. Pike, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48; T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; Cudahy Packing Co. v. Hibou, 92 Miss. 234, 46 So. 73, 18 L. R. A. (N. S.) 975. See also cases cited, ante, note 11.

[68] Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972.

the fact that he is a part owner of them. If the per cent. of the profits due him is a mere personal obligation owed him by his associate such person is not a partner.[69]

§ 84. Test of profit sharing—The Uniform Partnership Act.—The Uniform Partnership Act provides: "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: (a) as a debt by instalments or otherwise, (b) as wages of an

See McCrary v. Slaughter, 58 Ala. 230; McGill v. Dowdle, 33 Ark. 311; Wheeler v. Farmer, 38 Cal. 203; Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Norwalk v. Ireland, 68 Conn. 1, 35 Atl. 804; Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; Stubbs v. Fleming, 92 Ga. 354, 17 S. E. 935; State Nat. Bank v. Butler, 149 Ill. 575, 36 N. E. 1000; Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; Steele v. Michigan Buggy Co., 50 Ind. App. 635, 95 N. E. 435; Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Heard v. Wilder, 81 Iowa 421, 46 N. W. 1075; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354 (revd. 61 Kans. 602, 60 Pac. 314); Tanner v. Hughes, 21 Ky. L. 77, 50 S. W. 1099; Woodward v. Cowing, 41 Maine 9, 66 Am. Dec. 211; Staples v. Sprague, 75 Maine 458; Thillman v. Benton, 82 Md. 64, 33 Atl. 485; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Herbert v. Callahan, 35 Mo. App. 498; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Gates v. Johnson, 56 Nebr. 808, 77 N. W. 407; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Robbins v. McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406; Willey v. Renner, 8 N. Mex. 641, 45 Pac. 1132; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589 (see McGovern v. Mattison); Southern Fertilizer Co. v. Reames, 105 N. Car. 283, 11 S. E. 467; Braithwaite v. Aiken, 1 N. Dak. 475, 48 N. W. 361; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 29 (revd. 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870); Owen v. Oviatt, 4 Utah 95, 6 Pac. 527; Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766; Lathrop v. Knapp, 27 Wis. 214; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n.

[69] Ellsworth v. Tartt, 26 Ala. 733, 62 Am. Dec. 749; Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Allen v. Hudson, 78 Ill. App. 376; Hallett v. Desban, 14 La. Ann. 529; Thillman v. Benton, 82 Md. 64, 33 Atl. 485; Marsh v. Mueller,

employé or rent to a landlord, (c) as an annuity to a widow or representative of a deceased partner, (d) as interest on a loan, though the amount of payment vary with the profits of the business, (e) as the consideration for the sale of the good-

96 Mich. 488, 56 N. W. 71; Fay v. Davidson, 13 Gil. (Minn.) 491; Bruen v. Kansas City &c. Fair Assn., 40 Mo. App. 425; Mason v. Hackett, 4 Nev. 420; Robbins v. McKnight, 5 N. J. Eq. 642, 45 Am. Dec. 406; Wormser v. Lindauer, 9 N. Mex. 23, 49 Pac. 896; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Stevens v. Gainesville Nat. Bank, 62 Tex. 499; Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Bowyer v. Anderson, 2 Leigh (Va.) 550; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252n; Cooper v. Tappan, 9 Wis. 361. In a very thorough and exhaustive note in 18 L. R. A. (N. S.) beginning on page 963, on "the effect of an agreement to share profits to create a partnership," the author sums up his conclusions on p. 1105 as follows: "In spite of the discordant decisions, it is reasonably safe, whenever the profit sharing element is involved in a legal controversy relating to partnership or partnership liability, to accept as sound law certain propositions, which may be grouped in two classes according as the litigation is between or among the profit sharers alone, or between them and third persons. In the first class are the following statements: 1. Whether profit sharers between or among themselves are partners is to be determined by their intention to form or not to form a partnership. 2. That intention is determined by their contract if it is in writing. 3. The ordinary legal rules for the construction and interpretation of written instruments apply to partnership and profit sharing contracts. 4. If the profit sharing contract is unwritten and oral, the speech and conduct of the parties in relation to its subject-matter prove their intention to be or not to be partners. In the second class, when there is a controversy between profit sharers and third persons, the following statements: 1. That actual partners, whatever their private agreement, and however secret they have kept their relation, are liable for partnership debts. 2. That a profit sharer who is not a real partner is liable for partnership debts if he has held himself out, or knowingly permitted others to hold him out, as a partner to creditors who have given credit to the partnership in ignorance of his actual relation to it. 3. That profit sharing is evidence of the partnership relation; but that it is not conclusive evidence of it, but at the most prima facie or presumptive evidence of the partnership relation. 4. That this presumption of partnership may be overcome by countervailing proof. 5. That when the profit sharer is simply an agent or servant, one who furnishes property, a lender of money or a mere creditor, who receives the profits as compensation for his services, or the use of his property or money, or in order to collect his debt, without more, he is not liable as a partner, and the presumption is overthrown. A part of the confusion in the law of partnership is due to a lack of precision in the language of jurists. To say in one breath, as judges have said on numerous occasions anent a

will of a business or other property by instalments or otherwise."[69a]

§ 85. Test of mutual agency.—The formation of a partnership makes the members thereof mutual agents in the conduct of the partnership business, and in many cases this mutual agency is made the test whereby to determine the existence of a partnership.[70] Cox v. Hickman[71] seems to hold that one should not be held liable, "as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, and when, therefore, he would stand in the position of principal toward the ostensible members of the firm as his agents," as Lord Cranworth says, and Lord Wensleydale says,[72] "A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent,

profit sharing agreement between business associates, that it both does and does not make them partners—that it makes them partners as to third persons, but not partners as to each other—is bewildering. It is, moreover, untrue. The associates either are or are not partners. If they are not partners between or among themselves, they are not partners to anybody. All that is really meant when a court says that persons not actually partners are partners as to third persons is that they have made themselves liable as if they were partners. Another source of confusion is the obscure, if not unintelligible language used in many cases."

[69a] Uniform Partnership Act, § 7, cl. 4.

[70] Culley v. Edwards, 44 Ark. 423, 51 Am. Rep. 614; Lee v. Cravens, 9 Colo. App. 272, 48 Pac. 159; Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; Hallet v. Desban, 14 La. Ann. 529; Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Gibson v. Smith, 31 Nebr. 354, 47 N. W. 1052; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Hallenback v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576 (affd. 58 N. J. Eq. 580, 43 Atl. 1098); Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370; National Union Bank v. Landon, 66 Barb. (N. Y.) 189 (affd. 45 N. Y. 410); Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Hart v. Kelley, 83 Pa. St. 286; Boston &c. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Robinson v. Allen, 85 Va. 721, 8 S. E. 835; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397; Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47.

[71] 8 H. L. Cas. 268, 9 C. B. (N. S.) 47.

[72] 8 H. L. Cas. 312.

and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. * * * I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees. The trustees are certainly liable, because they actually contract by their undoubted agent, but the creditors are not, because the trustees are not their agents." In the case of Harvey v. Childs,[73] Judge Day, following Eastman v. Clark,[74] and the more recent English cases at that time, said: "Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related." But, while mutual agency may be a useful test in many instances, it is not strictly logical nor entirely satisfactory, and it has been pointed out by some of the courts, both of this country and England, that the agency results from the partnership and not the partnership from the agency.[75] In other words, agency is one of the attributes of the

[73] 28 Ohio St. 319, 22 Am. Rep. 387.

[74] 53 N. H. 276, 16 Am. Rep. 192, quoted in § 58 ante.

[75] Pooley v. Driver, 5 Ch. Div. 458, 46 L. J., Ch. 466, 36 L. T. 79, 25 W. R. 162. In this case, Jessel, M. R., said, referring to Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47: "I am almost sorry that the word 'agency' has been introduced into this judgment, because of course everybody knows that partnership is a sort of agency, but a very perculiar one. You can not grasp the notion of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the Court of Equity before it was part of the whole law of the land as it is now. But when you get that idea clearly you

partnership and is not the partnership itself. In the case of Boreing v. Wilson[76] it was said: "Likewise mutual agency has been abandoned as a conclusive test of partnership; the great weight of authority being to the effect that agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership, and not partnership from agency. Persons who are mutual agents in the conduct of a business and share the profits as partners are undoubtedly partners, and liable as such, and liability as a partner undoubtedly rests upon the principles of agency, and one is not a partner unless he shares the profits as a principal. But mutual agency is not a test of partnership, because the existence of such a relation is the very question in issue. The absence of power and authority on the part of one to bind his associates by his acts in the conduct of the business—that is, the absence of mutual agency—has been deemed to be conclusive that such person is not a partner. But this is incorrect. Although the absence of such power is a circumstance to be considered, it is not conclusive; for as between

will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent in the ordinary sense of the word, for the others so as to bind the others; he acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you can not grasp the notion of a separate entity for the firm then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity. That being so, you do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating in other words that he must be a partner, inasmuch as every partnership involves this kind of agency, or if you state that he is agent for the others, you state that he is a partner." Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972, quoted in § 67 ante; Stone v. Turfmen's Supply Co., 103 Ky. 318, 19 Ky. L. 20, 25, 45 S. W. 78; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, quoted in § 65 ante; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 26, 43 Am. St. 217. In this case it was said: "A reference to agency as a test of partnership has not, it seems, proved a correct guide in many cases, as agency results from partnership rather than partnership from agency."

[76] Boreing v. Wilson, 33 Ky. L. 14, 108 S. W. 914.

themselves the power of any partner to bind the firm may be limited to any desired extent."

§ 86. The principal trader test.—One writer has thus expressed and explained the principal trader test:[77] "The ultimate inquiry in all cases is whether the party claimed to be a partner has become by agreement a principal trader in the business with another. In other words, has he a right to participate as principal trader in the management of the business? If he has, he is a partner. If he has not, he is not a partner, with a single exception, which however, is rather apparent than real. The exception is this: A person may be a partner, even though he has by express agreement intrusted the control of the business exclusively to his associates in the business. The question, strictly speaking, is not whether the party has a right to control the business as principal trader in the particular case, but whether he would have such right in that case by virtue of the agreement between himself and another, in the absence of any express provision conferring that right upon his associate in the business. If it appears that he would have had such right had it not been for his agreement to the contrary, then he is a partner, and his agreement merely operates as a surrender to his associate of a right which he would otherwise have enjoyed. We submit that upon principle the question of partnership is to be determined by the three following rules: 1. When the recipient of profits has, by virtue of an agreement with another, a right to participate as principal trader in the management of the business out of which the profits are to arise, then he is a partner, and liable as such; and no secret intent not to become a partner, and no provision in the contract restricting his liability, or exempting him from all liability will afford him immunity from the responsibilities of a partner. 2. When the recipient of profits would in the absence of any express provisions in the agreement to the contrary, have by virtue of such agreement a right to participate as principal trader in the management of the business,

[77] Judge Guy C. H. Corliss, in 30 Alb. Law J. 26, 30.

then he is a partner, even though he has expressly agreed that his associate in the business shall have the right to exercise exclusive control in conducting the business. 3. In all other cases the recipient of profits is not a partner, and can not be held liable to creditors unless he has estopped himself from denying that he is a partner."

This test, though apparently not followed by the courts to any great extent, seems, in the main at least, to be very satisfactory.[78]

§ 87. Intention test in England.—The rule that intention is the test of partnership, is usually said to have originated in Cox v. Hickman;[79] for although that case prominently mentions mutual agency as a test it also brings in the test of intention, and was a turning point in English partnership law. In certain cases succeeding Cox v. Hickman, namely Bullen v. Sharp,[80] Mollwo v. Court of Wards[81] and Pooley v. Driver,[82] all based upon Cox v. Hickman, the test of intention was firmly established. In the case of Mollwo v. Court of Wards,[83] it was said: "It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where from such perception alone, it may, as a presumption, not of law, but of fact, be inferred; yet that

[78] In the case of Clark v. Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503n, quoting from Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252, it is said: "To constitute a partnership between parties who share in the profits, the interest in the profits must be mutual,—each person must have a specific interest in them as a principal trader; he is not a partner merely because he receives a part of the profits as compensation for his services." Compare Loomis v. Marshall, 12 Conn. 70, 30 Am. Dec. 596; Johnson v. Rothschilds, 63 Ark. 518, 41 S. W. 996; Omaha &c. Smelting &c. Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 853; Fougner v. First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Emmons v. Newman, 38 Ind. 372; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Grigsby v. Day, 9 S. Dak. 585, 70 N. W. 881; Robinson v. Allen, 85 Va. 721, 8 S. E. 835.

[79] 8 H. L. Cas. 268.

[80] L. R. 1 C. P. 86.

[81] L. R. 4 P. C. 419.

[82] L. R. 5 Ch. Div. 458, 46 L. J., Ch. 466, 36 L. T. 79, 25 W. R. 162.

[83] L. R. 4 P. C. 419.

whether that relation does or does not exist must depend on the real intention and contract of the parties."

§ 88. Intention test in America—Polk v. Buchanan.—In some American jurisdictions this principle had previously been judicially recognized. The case of Polk v. Buchanan,[84] a Tennessee case decided in 1857, three years before the celebrated Cox v. Hickman, is probably the leading American case upon the subject. Judge McKinney, in a very comprehensive opinion, thus discusses this question: "The rule of common law relied on by the complainants' counsel in support of the bill is, that a specific interest in profits, as profits, or in other words, as participation in the net profits of a business, will, by construction of law, create a partnership between the parties, in favor of third persons. Whether, on a careful review of the English authorities, the conclusion is warranted, that any such universal rule exists, is an inquiry we need not stop to make. If it were admitted to be so, that rule has been essentially modified by the decisions of several of the American courts, and upon principles of reason and natural justice that can not fail to command general assent and approval. * * * The American authorities referred to, do not admit the doctrine that the mere fact of participation of profits of a business, whether gross or net profits, is to be taken as conclusive of a partnership, even in favor of creditors, irrespective of the truth of the case. They seem to proceed upon the more just and sensible view, that participation in the profits affords merely a presumption which is to prevail only in the absence of proof to the contrary; and that it is a question of fact, upon inquiry and proof, whether the circumstances under which the participation in the profits exists, clearly demonstrate that the profits are taken, not in the character of partner, but in a totally different character, and merely as compensation for services or benefits rendered by the person by whom they are received. In the latter case, while it is true that, in a certain sense, the party has a community of interest in the profits, yet it is no less true

[84] 5 Sneed. (Tenn.) 721.

that he does not participate therein as an owner or partner. * * * The doctrine, thus qualified and understood, makes the rule consistent with the great and leading principle of construction, that all agreements are to be expounded, and to have effect given to them, according to the manifest intention of the parties as apparent from the whole instrument or agreement, if not incompatible with established principles of law or policy." The above decision gives perhaps the most lucid explanation of the theory of intention as a test, of any adhering to this principle.[85]

§ 89. Later American cases on intention as test.—In Beecher v. Bush,[86] Judge Cooley says: "Except when one allows the public or individual dealers to be deceived by the appearance of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. * * * It is nevertheless possible for parties to intend no partnership and yet form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent." In Boreing v. Wilson,[87] it was said: "After all, the intention of the parties is the controlling element. When the parties intend a co-ownership of the profits of a business, a partnership necessarily follows. But, however great the diversity of opinion among the courts, the law is well settled that where the parties by their acts, conduct and writings, show that they intended a partnership, and did in fact agree to share the profits of the business as joint

[85] See in accord cited: Loomis v. Marshall, 12 Conn. 69; Denny v. Cabot, 6 Met. (Mass.) 82; Bradley v. White, 10 Met. (Mass.) 303; Blanchard v. Coolidge, 22 Pick. (Mass.) 151; Chase v. Barrett, 4 Paige (N. Y.) 148; Vanderburgh v. Hull, 20 Wend. (N. Y.) 70; Story Partnership, § 36.

[86] 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

[87] (1908) 33 Ky. L. 14, 108 S. W. 914.

owners, such parties are partners." In 1910, a Washington case,[88] held that: "The essential test in determining the existence of a partnership is whether the parties intended to establish such a relation, and as between themselves the intention must be determined by their express agreement or inferred from their acts." It has also been held that participation in the profits of a business is a mere circumstance to show the relation between persons taking the profits and those carrying on the business; the test of partnership as between the parties being a question of actual intent, either expressed in the contract or implied from the acts of the parties and the circumstances surrounding their relationship.[89]

It is held that only where there is no proof of actual agreement, is the rule that sharing of profits raises a prima facie presumption of partnership applicable, that where there is an actual agreement, the question of partnership must be determined from it.[90] The court will look to the entire transaction in order to find the intention of the parties, and this intention, when discovered, will determine the existence or nonexistence of the alleged partnership.[91] As between the parties themselves, a partnership results from their agreement evidencing an intent to create one, and there must be an intention to create the relation. It can not be created by implication or by operation of law,[92] though sometimes it is held that the agreement to create a partnership may be either express or implied.[93] It makes no difference what arrangements have been made between parties for conducting their business, for as between themselves, if no part-

[88] Yatsuyanagi v. Shimamura, 59 Wash. 24, 109 Pac. 282.

[89] Roach v. Rector, 93 Ark. 521 (1909), 123 S. W. 399; In re Whitlow's Estate, 184 Mo. App. 229, 167 S. W. 463.

[90] In re Whitlow's Estate, 184 Mo. App. 229, 167 S. W. 463.

[91] In re Hirth, 189 Fed. 926; Beller v. Murphy, 139 Mo. App. 663 (1910), 123 S. W. 1029; A. Graf Distilling Co. v. Wilson, 172 Mo. App. 612, 156 S. W. 23.

[92] Reed v. Engel, 237 Ill. 628, 86 N. E. 1110; Crawford v. Wiedemann, 159 Ky. 18, 166 S. W. 595; In re Whitlow's Estate, 184 Mo. App. 229, 167 S. W. 463.

[93] Watson v. Hamilton (Ala.), 60 So. 63.

nership were intended, then there is none as between themselves.[94] The particular facts of each case are controlling.[95] So it is held that whether a party who furnishes money to another under an agreement that he shall receive in lieu of interest half the profits of a business which the other conducts, is a partner in the business, or whether he merely loaned the money, depends on the intention of the parties.[96] It is perhaps needless to say that in those jurisdictions where intention is the test, a partnership as between the parties does not necessarily result from an agreement to enter into a joint enterprise and share the profits.[97] Proof of participation in profits and losses is but prima facie evidence of a partnership, which may be rebutted, while the intention of the parties is the real test.[98] It will be remembered that intention, as sometimes used, does not necessarily refer to the conscious working of the mind, but to a legal intention which the law deduces from the acts of the parties, and if they intend to do a thing which in law constitutes a partnership, they are partners, though their purpose was to avoid the creation of such a relation.[99] It has likewise been held that where a contract in writing expressly creates a partnership between defendants and third persons, making plaintiff the agent of the defendants to conduct a business so far as their interests are concerned, a partnership is formed, though the intention of the parties thereto was simply that the contract was for security for the defendants for money loaned plaintiff to buy into the partnership.[1] It has also been held that where two dealers contracted mutually to pay each other half the net profits of their businesses, but stipulated that the agreement should not be construed as creating a

[94] Sawyer v. Burris, 141 Mo. App. 108; 121 S. W. 321; Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[95] Willoughby v. Hildreth, 182 Mo. App. 80, 167 S. W. 639.

[96] Bass v. Clements, 6 Ala. App. 167, 60 So. 443.

[97] Reed v. Engel, 237 Ill. 628, 86 N. E. 1110.

[98] Nugent v. Armour Packing Co., 208 Mo. 480, 106 S. W. 648.

[99] Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37.

[1] Monson v. Ray, 123 Mo. App. 1 (1907), 99 S. W. 475.

partnership, they are not partners as between themselves.[2] The same case holds that the court in determining whether a partnership was created, will consider what the parties did, not what they intended to do, unless there is a doubt.[3]

All the facts surrounding the transaction must be taken into consideration. Among the facts which are to be taken into consideration in determining the intention is whether or not the alleged partner acquired by the contract any property in or control over, or specific lien to, the profits before division thereof, in preference to other creditors.[4] As to the partnership liability toward third persons, this rule of intention is relaxed somewhat, but even as to third persons, in order to ignore the rule of intention the party must show that he was deceived as to the relationship, and that he did not know there was no partnership relation.[5] As said in a Missouri case: "Except in cases in which parties have held themselves out as copartners, and credit has been extended to them as such, when in fact they were not partners between themselves, a partnership is a relation between two or more competent persons resulting from a contract, and accordingly only exists where the parties intend to enter into a contract of partnership; for this, like other contracts, must be construed according to the manifest intention of the parties, and must be determined by the contract itself and the surrounding circumstances."[6] Existence of a partnership liability as to third persons is determined by the contract as a whole, considered together with the conduct of the parties to the contract and their dealings as to the world.[7]

[2] Sample v. Farson, 174 Ill. App. 334.

[3] Sample v. Farson, 174 Ill. App. 334.

[4] Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067; Clark v. Emery, 58 W. Va. 637 (1906), 52 S. E. 770, 5 L. R. A. (N. S.) 503n.

[5] Ageloff v. Lakin, 115 N. Y. S. 1082 (1909); Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363.

[6] Diamond Creek &c. Mining Co. v. Swope, 204 Mo. 48, 102 S. W. 561, 120 Am. St. 681. Unless persons are in fact partners inter se or have held themselves out as partners under circumstances such as to estop them from denying the relation, they are not liable as partners to third parties. Hudleson v. Boston, 169 Ill. App. 300.

[7] Wescott v. Gilman (Cal.), 150 Pac. 777.

It will be noticed that some of the later cases cited above, which hold that intention is a legal conclusion, really depart from the rule of Cox v. Hickman and similar American cases and perhaps more nearly approach other tests than those of intention, as these other tests may be looked to, or at least considered, to find the real legal, as distinguished from the actual intent. The text writers contended for the test of intention, and exposed the fallacies in the profit-sharing test, and even deduced other rules from the authorities long before the courts adopted the intention test. Judge Story says:[8] "In short, the true rule, ex aequo et bono, would seem to be, that the agreement and intention of the parties themselves should govern all cases. If they intended a partnership in the capital stock or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." And Collyer says,[9] after considering Waugh v. Carver,[10] and other English cases, "Upon the whole, notwithstanding the doctrine laid down in Hesketh v. Blanchard[11] and some other cases, the general result of the authorities seems to be, that persons who share the profits of the concern are prima facie liable as partners to third persons, but that they may repel the presumption of partnership by showing that the legal relation of partnership inter se does not exist."

§ 90. Intention test of partnership under the Civil Law.—The status of partnership under the civil law, and its derivatives, is well expressed in a Louisiana case:[12] "It is elementary in our

[8] Story Partnership (5th ed.) 1859, § 49; quoted in Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217.

[9] Collyer Partnership (3 Amer. ed.) 1848, § 85, p. 75.

[10] 2 H. Bl. 235.

[11] 4 East 144.

[12] Marr, J., in Chaffraix v. Lafitte, 30 La. Ann. 631.

law, that there can exist no partnership without the consent of the parties, that is without a contract establishing that relation. This was the rule of the Roman law. Papinian calls partnership voluntarium consortium. Dig. 17, tit. 2, l. 52, § 8; and Ulpian says, id. 1. 44. 'Si margarita tibi vendanda dedero, ut si ea decem vendidisses, redderes mihi decem; si pluris quod excedit, tu haberes; mihi videtursianimo contrahendae societatis id actum sit, pro socio esse actionem; si minus præscriptis verbis.' There was no inquiry as to whether a compensation was to be given, in proportion to the profits, equal to a certain share, or a specific interest in the profits themselves as profits. The sturdy Jurisconsult did not dally with artificial distinctions, resting on imaginary differences, but came squarely up to the question submitted to him; and he solved it by a rule too plain to be misunderstood, an unerring guide, a perfect test, under all systems, in all ages, in all cases. If the parties intended to contract a partnership, 'si animo contrahendae societatis,' then that will be their relation with respect to themselves, and to all persons whomsoever, even to the extent of controlling the form of the actions to which it may give rise. If that was not their intention, si minus, their agreement will not constitute a partnership, whether inter sese, or with respect to others. It may fall into that mass of contracts styled innominate, because not susceptible of distinctive classification, but not less obligatory on that account; and the litigations which may grow out of it must be in form actiones in factum, actions on the case, so-called 'quia nomen non possumus invenire,' which were as well known and as useful in the Roman tribunals as they are now in Westminster Hall. Dig. 19, title 5, l. 1. In France, 'La societe procede toujours d'un contrat. Sans convention, point de societe. Troplong, Societe, 1, p. 9, No. 3."

§ 91. Test of partnership liability arising by estoppel generally—It is perhaps improper to speak of estoppel as a test of partnership, as the very meaning of the word estoppel raises an implication that there is no relation to which it can be applied, but simply that the acts of the party estopped prevent him

from setting up the real facts of no such relation. However, as it is chiefly partnership liability rather than actual relation which is here discussed, it is perhaps not amiss to include it in this discussion as a test of partnership liability. It is based upon the principle that if a person holds himself out, either actively or passively, or permits himself to be held out as a member of a partnership, and so, perhaps, induces third parties to deal with the firm and extend credit upon the belief that the party estopped was a member thereof, and upon the credit of this party, when otherwise they would not have so dealt, he should not then be allowed to deny his apparent connection with the partnership, and so escape liability, to the detriment of the creditors who relied upon his acts or representations.[13]

It is said that when a holding out as partners has once been established, the parties are liable to one induced thereby to give credit, the ground of such liability not being upon direct representations between the parties, but upon the principles of general policy to prevent fraud.[14] The only means by which persons between whom there is no actual partnership can be held liable as partners is by making out a case of estoppel against them,[15] and all the elements of estoppel must exist.[16]

§ 92. **Nature of acts and conduct creating estoppel.**—A party who is named as a partner in articles of partnership, who has control of the management of the business, and shows a third person the articles of partnership who loans money to the

[13] Morris v. Brown, 177 Ala. 389, 58 So. 910; Letson v. Hall, 1 Ala. App. 619, 55 So. 944; United States Wood Preserving Co. v. Lawrence (Conn.), 95 Atl. 8; American Cotton College v. Atlanta Newspaper Union, 138 Ga. 147, 74 S. E. 1084; In re McDonald's Estate (Iowa), 149 N. W. 897; Oil Well Supply Co. v. Metcalf, 174 Mo. App. 555, 160 S. W. 897; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Downie v. Savage, 72 Wash. 164, 129 Pac. 1096; Loosen v. Schissler, 149 Wis. 449, 135 N. W. 1008.

[14] Folks v. Burletson, 177 Mich. 6, 142 N. W. 1120.

[15] Hudleson v. Boston, 169 Ill. App. 300; Studebaker Corp. of America v. Dodds, 161 Ky. 542, 171 S. W. 167; McKallip v. Geese, 30 Okla. 33, 118 Pac. 586; Hamner v. Barker (Tex. Civ. App.), 144 S. W. 1180.

[16] Steele v. Michigan Buggy Co., 50 Ind. App. 635, 95 N. E. 435.

concern, believing it to be a partnership, thereby becomes estopped from denying his partnership liability, even though there was, in fact, no actual partnership.[17] If one so deals with another that he leads others to believe that there is, in fact, a partnership, he will be held to partnership liability if the third parties act upon this belief.[18] Intentional representations by the parties or by others with their consent, which would tend to lead the general public to believe they were partners in fact, is sufficient to create partnership liability by estoppel.[19] So false representations by persons engaging in business, made in order to induce a third person to purchase it, are held to estop them from denying partnership liability.[20]

If a contract purports to be entered into by a partnership under a firm name, the fact of the partnership can not be denied, by those making the contract,[21] nor can they claim they were merely agents of the firm.[22]

The use of a partnership name in advertising may estop the parties using it from denying partnership liability to third persons relying upon such advertising, but as between the parties, the contract and circumstances govern, and one of the parties who alleges the existence of a partnership, has the burden of proving it.[23] So where one publishes a pamphlet referring to a person who ordered goods as the managing partner of the business for which the goods were sold, and the seller of the goods had read the pamphlet and gave credit on the strength of the partnership, the publisher of the pamphlet is estopped to deny the partnership liability for the goods.[24] One who procures an extension of credit

[17] Campbell v. Huffines, 151 N. Car. 262 (1909), 65 S. E. 1000, 134 Am. St. 987.

[18] Michael Bros. Co. v. Davidson, 3 Ga. App. 752 (1908), 60 S. E. 362; Jansen v. Jacobson, 112 Minn. 520 (1910), 128 N. W. 824; Coons v. Coons, 106 Va. 572 (1907), 56 S. E. 576.

[19] Folks v. Burletson, 177 Mich. 6, 142 N. W. 1120.

[20] Schwier v. Hurlburt (Mich.), 151 N. W. 603.

[21] Richards v. Hellen, 153 Iowa 66, 133 N. W. 393.

[22] Bourgeois v. Bustanoby, 78 Misc. 404, 138 N. Y. S. 366.

[23] Smith v. Lancaster, 37 App. D. C. 25.

[24] Flock v. Williams, 175 Ill. App. 319.

to a partnership of which he holds himself out as a member, is estopped to deny liability for the debt.[25] And one who receives another as partner, and allows him to conduct the business, is estopped from denying liability as a partner for his acts in the management of the business.[26] The denial by one partner of the existence of a partnership can not affect the rights of one who purchases from another member of the firm.[27]

After the death of one who held himself out as one member of a partnership and contracted notes in the firm name, the survivor who took over the property managed by the deceased, and continued the business, and paid one of such notes after his death, was held estopped to deny his partnership liability on other notes executed by deceased in the firm name for property used in the business.[28]

§ 93. **Reliance on the holding out.**—It should be kept in mind, however, that the third person must rely upon the alleged estopping acts when entering into dealings with the firm, if he would rely upon these acts in enforcing partnership liability,[29] and must have suffered a detriment because of such reliance.[30] Merely the fact that one knew that letters came to the saw-mill where he and his brother worked addressed to them as "S. Bros.", did not estop him from denying partnership liability with his brother in the saw-mill business.[31] Moreover, the fact that a party stands by and advises another to buy goods, in the presence of the third person or his agent, even if the party buying directed the party selling to send the goods to the firm, will not of itself constitute an estoppel against the said person so standing by,[32]

[25] Mitchell v. Craig, 11 Ga. App. 79, 74 S. E. 716.

[26] Carsey v. Swan, 150 Ky. 473, 150 S. W. 534.

[27] Payne v. Dexter, 211 Mass. 1, 97 N. E. 77.

[28] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[29] Mock v. Stoddard, 177 Fed. 611 (1910); L. S. Meharg Liquor Co. v. Davis (Ala.), 66 So. 576; Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759; In re McDonald's Estate (Iowa), 149 N. W. 897.

[30] Downie v. Savage, 72 Wash. 164, 129 Pac. 1096.

[31] Downie v. Savage, 72 Wash. 164, 129 Pac. 1096.

[32] Mayer Bros. Co. v. Bricca, 122 N. Y. S. 197 (1910).

although it would undoubtedly be strong evidence supporting a claim of partnership liability. In this case the name of the firm would also have a strong bearing upon the question. A mere statement by a person that he has authority to buy goods for another does not estop him from setting up that there is no partnership or liability;[33] although agency is an essential element of partnership, yet the converse is not necessarily true, and partnership is not necessarily implied when agency is shown. It should also be remembered that a declaration of a third person as to a party being in a partnership, in order to estop the party charged from denying the relation, must have been made in the hearing and presence of such party to be charged, or under such circumstances as make it reasonably certain that he heard the statement alleging his membership in the partnership.[34]

§ 94. **Right of subrogation of ostensible partner.**—Although, as has been shown, one who holds himself out as a partner, thus obtaining credit for a firm, becomes liable therefor to creditors granting credit on the strength thereof, the party thus loaning the use of his name to the firm has a right of action against the real debtor for whatever he may be obliged to pay to the creditors by reason of his assumed partnership liability.[35]

§ 95. **Creditor must be misled by acts or misrepresentations.**—The reason for the rule of estoppel above given is simply to protect the creditor against acts or representations of the ostensible partner, in credit given the concern on the belief that he is dealing with the ostensible partner as well as with the other member or members of the supposed partnership, and, consequently, the rule is only applied when the creditor relies on the acts or representations, believing them to be true. If, therefore, the defendant is sought to be charged, by estoppel, with certain debts of an ostensible partnership, the creditor must show, in ad-

[33] Armstrong v. King (Tex. 1910), 130 S. W. 629.

[34] Sax v. Doughty, 76 N. J. L. 225 (1908), 68 Atl. 912.

[35] Johnson v. Williams, 111 Va. 95 (1910), 68 S. E. 410, 31 L. R. A. (N. S.) 406n, Ann. Cas. 1912 A, 47n.

dition to the fact that defendant held himself out as a partner, that he, the creditor, was misled thereby, and that he acted thereon.[36] Thus, one who knows the actual relation of principal and agent exists between the parties he is seeking to charge as partners and has not been misled by them, can not hold them liable as partners by estoppel.[37] Nor will payment to a person held out as a partner, made with express notice that he is not a partner, discharge a debt owing to a partnership.[38] The person alleging partnership liability by reason of estoppel may, moreover, be required to show that he exercised due diligence to ascertain the true facts. The doctrine as above laid down, is, however, inapplicable where defendant directly and affirmatively holds himself out to plaintiff as a partner, and induces the plaintiff to extend credit on the faith of such representation.[39]

§ 96. **Time of making representation.**—The representations of partnership must have been made before the belief was formed and acted upon by the creditor, and not subsequently,[40] in order that the partnership liability by estoppel be created.

§ 97. **Mere belief of creditor.**—If the defendant is not in fact a partner, the mere belief of the person extending credit that the defendant was a partner is not sufficient to establish partnership liability, in the absence of evidence that defendant held himself out to plaintiff as a partner when the credit was extended. The liability by estoppel can only be established by the facts of the case, and in the face of contrary facts, such a belief of the party extending the credit is of no avail.[41] Even if one has

[36] Herman Kahn Co. v. Bowden, 80 Ark. 23 (1906), 96 S. W. 126; Mims v. Brook, 3 Ga. App. 247 (1907), 59 S. E. 711; Breinig v. Sparrow, 39 Ind. App. 702 (1907), 80 N. E. 40; Morback v. Young, 51 Ore. 128 (1908), 94 Pac. 35; Morris v. Moon (Tex. Civ. App. 1909), 120 S. W. 1063.

[37] National Lumber &c. Co. v. Grays Harbor Commercial Co., 71 Wash. 31, 127 Pac. 577.

[38] Silverblatt v. Rosenberger, 133 N. Y. S. 990.

[39] Gershner v. Scott-Mayer Commission Co., 93 Ark. 301 (1910), 124 S. W. 772.

[40] Steele v. Michigan Buggy Co., 50 Ind. App. 635, 95 N. E. 435; Bowen v. Epperson, 136 Mo. App. 571 (1909), 118 S. W. 528; Downie v. Savage, 72 Wash. 164, 129 Pac. 1096.

[41] Manlove v. Metzger, 124 Ill. App.

held himself out to the general public as a partner, but is not one in fact, he is not estopped to deny existence of the partnership, when the one seeking to charge him as partner knew he was not one, or had no reasonable ground to believe him one.[42] But where there has been a holding out to the public, a creditor who relied on mere rumor or hearsay is not prevented by that fact from recovering.[43]

§ 98. Attempted limited partnership.—In case an attempt is made by several parties to form a limited partnership, which attempt fails through nonobservance of legal formalities and statutory regulations, all the parties interested therein as members are liable as common partners to third persons, and are estopped from denying such liability.[44] Although the parties to an attempt to form a limited partnership have been held liable as general partners to third persons as between themselves it is undoubtedly true that they may still adjust their respective liabilities in proportions or amounts as provided for in their original agreement, insofar as it does not interfere with the rights of the creditors.

§ 99. Estoppel—Former partnership.—The mere fact that defendant was a former partner in the debtor firm is not, of itself, sufficient to estop the defendant from denying partnership, and a Michigan case[45] has held that where a carrier has delivered goods to an unauthorized person, who was a former partner of the shipper, but where the shipper did not know of the former relation at the time of delivery, there is no estoppel on the part of the shipper to deny a partnership relation and consequent agency.

§ 100. Partnership under agreement to incorporate.—Although several parties, who are transacting business as partners,

383 (1906); In re McDonald's Estate (Iowa), 149 N. W. 897.

[42] In re McDonald's Estate (Iowa), 149 N. W. 897.

[43] Folks v. Burletson, 177 Mich 6, 142 N. W. 1120.

[44] Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135 (1906).

[45] Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 108 N. W. 706.

have agreed to incorporate, they are nevertheless liable as partners to third persons with whom they deal as partners.[46] It has been held that subscribers to the stock of a proposed corporation were partners in the business which they intended to follow before incorporation.[47] The contrary has also been held.[48] The general rule is that the promoters of a corporation are not, because of their association, liable as partners before the incorporation of the company, for the reason that there is no agreement of partnership, and also there is no agreement to share the profits.[49] An express or implied agency existing on the part of all toward each other, may cause them, however, to be held liable as partners in some transactions.[50] The subject of the liability of those who have promoted a defective corporation, or attempted to form one, or have pretended to carry on business as one, or are stockholders in a defectively organized corporation, will be treated later.[51]

§ 101. **Estoppel—Uniform Partnership Act.**—Under the Uniform Partnership Act: "Except as provided by section sixteen, persons who are not partners as to each other are not partners as to third persons."[52] Section sixteen provides: "When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner is an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership; and if he has made such representation or consented to its being

[46] Michael Bros. Co. v. Davidson, 3 Ga. App. 752 (1908), 60 S. E. 362.

[47] Mt. Carmel Tel. Co. v. Mt. Carmel &c. Tel. Co., 119 Ky. 461, 27 Ky. L. 30, 84 S. W. 515.

[48] Hudson v. Spaulding, 53 Hun 638, 6 N. Y. S. 877, 25 N. Y. St. 256.

[49] Hersey v. Tully, 8 Colo. App. 110, 44 Pac. 854; Arnold v. Conklin, 96 Ill. App. 373; McLennan v. Anspaugh, 2 Kans. App. 269, 41 Pac. 1063; Sproat v. Porter, 9 Mass. 300; Dole v. Wooldredge, 135 Mass. 140; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Mosier v. Parry, 60 Ohio St. 388, 54 N. E. 364.

[50] McFall v. McKeesport &c. Ice Co., 123 Pa. 253, 16 Atl. 478.

[51] See post ch. 9.

[52] Uniform Partnership Act, § 7.

made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made. (a) When a partnership liability results, he is liable as though he were an actual member of the partnership. (b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately. (c) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representations to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation, where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation."[53]

§ 102. Summary of tests.—Summing up the various and conflicting decisions upon the test of partnership, it is safe to say that, insofar as any actual partnership is concerned, intention is the usual test, that is, as between the partners themselves. As regards partnership liability to third persons, there is considerable diversity of opinion. The test usually applied is the sharing of profits and losses. There is, however, a growing tendency on the part of the American courts to look at the so-called tests more as presumptive than as conclusive tests, and to take all the matters of the transaction into consideration in arriving at a decision.

§ 103. Summary—Question of law or fact—Intention.—Under the modern theory the existence of a partnership is treated largely as a question of fact.[54] But when the terms of the agree-

[53] Uniform Partnership Act, § 16.

[54] Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154; Robinson v. Green, 5 Har. (Del.) 115; Adamson v. Guild, 177 Mass. 331, 58 N. E. 1081; Densmore v. Mathews, 58 Mich. 616,

ment and the facts are all admitted the question as to whether or not a partnership exists is a question of law.[55] In determining the existence of a partnership it is well settled that the true contract and intention of the parties is looked to at least as between themselves, in order to establish the existence of such relation.[56] This has led to a general statement that, as between the immediate parties, a partnership is formed and exists only by their intention to form such a relationship,[56a] but the law looks to the substance and not the form. It is not what the parties call their

26 N. W. 146; McDonald v. Matney, 82 Mo. 358 (proved by the best attainable evidence); Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136 (modified 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136); Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870. See also Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455.

[55] Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Schmidt v. Balling, 91 Ill. App. 388; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Farmers' Ins. Co. v. Ross, 29 Ohio St. 429.

[56] Hazard v. Hazard, 1 Story (U. S.) 371, Fed. Cas. No. 6279; Earle v. Art Library Pub. Co., 95 Fed. 544; Culley v. Edwards, 44 Ark. 423, 51 Am. Rep. 614; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Stevens v. Faucet, 24 Ill. 483; Niehoff v. Dudley, 40 Ill. 406; Lintner v. Millikin, 47 Ill. 178; National Surety Co. v. T. B. Townsen Brick & Contracting Co., 176 Ill. 156, 52 N. E. 938; Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. 251; Kerr v. Potter, 6 Gill (Md.) 404; Cannon v. Brush Elec. Co., 96 Md. 446, 54 Atl. 121, 94 Am. St. 584; Gray v. Gibson, 6 Mich. 300; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; A. N. Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370; Wright v. Taylor, 9 Wend. (N. Y.) 538; Salter v. Ham, 31 N. Y. 321; Central City Sav. Bank v. Walker, 66 N. Y. 431; Hayward v. Barron, 19 N. Y. S. 383, 46 N. Y. St. 665; Boston &c. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Polk v. Buchanan, 5 Sneed. (Tenn.) 721. See also Ex parte Hamper, 17 Ves. 407, 11 R. R. 115; Badeley v. Consolidated bank, 38 Ch. Div. 238, 57 L. J. Ch. 468, 59 L. T. 419, 36 W. R. 745; Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47; Mollwo v. Court of Wards, L. R. 4 P. C. 419.

[56a] Hazard v. Hazard, 1 Story (U. S.) 371, Fed. Cas. No. 6279; In re Pierson, 10 Nat. Bankr. Reg. 107, Fed. Cas. No. 11153; Chisholm v. Cowles, 42 Ala. 179; Randle v. State, 49 Ala. 14; Nelms v. McGraw, 93 Ala. 245, 9 So. 719; Gulf City Shingle Mfg. Co. v. Boyles, 129 Ala. 192, 29 So. 800; Wheeler v. Farmer, 38 Cal. 203; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Ellsworth v. Pomeroy, 26 Ind. 158; T. E. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; Fairly v. Nash, 70 Miss. 193, 12 So. 149; Mackie v. Mott, 146

relation that determines but what they actually agree upon in their contract.[56b] It is the intent to do those things which constitute a partnership that should usually determine whether or not that relation exists between the parties.[57] But, on the other hand, if the terms of the contract or the facts are not such as to make the parties partners, or authorize that conclusion, they will not be declared to be partners even though they intended to form a partnership and call themselves partners.[58] It is not necessary to

Mo. 230, 47 S. W. 897; Hughes v. Ewing, 162 Mo. 261, 62 S. W. 465; Smith v. Dunn, 44 Misc. (N. Y.) 288, 89 N. Y. S. 881; Willis v. Crawford, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; Cleveland v. Anderson, 2 Willson Civ. Cas. Ct. App. (Tex.), § 146; Walker v. Hirsch, L. R. 27 Ch. Div. 460, 54 L. Ch. 315, 51 L. T. 581, 32 W. R. 992.

[56b] Martin v. Martin, 1 N. B. Eq. 515; Trustees &c. v. Oland, 35 N. S. 409.

[57] Bestor v. Barker, 106 Ala. 250, 17 So. 389; Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Webster v. Clark, 34 Fla. 637, 16 So 601, 27 L. R. A. 126, 43 Am. St. 217n; Pursley v. Ramsey, 31 Ga. 403; Fougner v. First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Griffen v. Cooper, 50 Ill. App. 257; Hart v. Hiatt, 2 Ind. T. 245, 48 S. W. 1038; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Halliday v. Bridewell, 36 La. Ann. 238; Thillman v. Benton, 82 Md. 64, 33 Atl. 485; Gunnison v. Langley, 3 Allen (Mass.) 337; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Vaiden v. Hawkins (Miss.), 6 So. 227; Mulhall v. Cheatham, 1 Mo. App. 476; Van Kuren v. Trenton Locomotive &c. Mfg. Co., 13 N. J. Eq. 302; Sheridan v. Medara, 10 N. J. Eq. (2 Stockton's Ch.) 469, 64 Am. Dec. 464; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Leggett v. Hyde, 58 N. Y. 272, 47 How. Pr. 524, 17 Am. Rep. 244; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589. See McGovern v. Mattison, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Klosterman v. Hayes, 17 Ore. 325, 20 Pac. 426; Righter v. Farrell, 134 Pa. 482, 19 Atl. 687; Boston &c. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Burnley v. Rice, 18 Tex. 481; Duryea v. Whitcomb, 31 Vt. 395; Rosenfield v. Haight, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770.

[58] Oliver v. Gray, 4 Ark. 425; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; Dwinel v. Stone, 30 Maine 384; Rose v. Buscher, 80 Md. 225, 30 Atl. 637; Ryder v. Wilcox, 103 Mass. 24; McDonald v. Matney, 82 Mo. 358; Van Kuren v. Trenton Locomotive &c. Co., 13 N. J. Eq. 302; Burnett v. Snyder, 76 N. Y. 344.

adopt a firm name to constitute a partnership,[59] nor is it necessary that the relation be called a partnership.[60]

The law on this branch of the subject has been summarized as follows: "The question is one of intention, and a contract of partnership will no more be created by the court against the will of a party than will those of any other character. One may not make a contract of partnership, and, calling it an agency, have it treated as such by the court for when the facts are known the

[59] Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748; Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154; Santiago v. Morgan, Fed Cas. No. 12331; Hoffm. Ops. 447; Meaher v. Cox, 37 Ala. 201; Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Staples v. Sprague, 75 Maine 458; Wadsworth v. Manning, 4 Md. 59; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650; Tharp v. Marsh, 40 Miss. 158; Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313; Musier v. Trumphour, 5 Wend. (N. Y.) 274; Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. 810; Johnson v. Alexander, 46 App. Div. 6, 61 N. Y. S. 351 (affd. in 167 N. Y. 605, 60 N. E. 1113); Jones v. Walker, 51 Misc. (N. Y.) 624, 101 N. Y. S. 22; Gregg Twp. v. Half-Moon Twp., 2 Watts. (Pa.) 342; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; Upham v. Hewitt, 42 Wis. 85; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

[60] Plunkett v. Dillon, 4 Houst. (Del.) 338; Fougner v. First Nat. Bank, 41 Ill. App. 202 (revd. 141 Ill. 124, 30 N. E. 442); Griffen v. Cooper, 50 Ill. App. 257; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Webb. v. Johnson, 95 Mich. 325, 54 N. W. 947; King v. Remington, 36 Minn. 15, 29 N. W. 352; Fairly v. Nash, 70 Miss. 193, 12 So. 149; Teas v. Woodruff (N. J. Ch.), 10 Atl. 392 (revd. 45 N. J. Eq. 880, 19 Atl. 623); Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Clift v. Barrow, 108 N. Y. 187, 15 N. E. 327; Hawkins v. Campbell, 48 App. Div. 43, 62 N. Y. S. 678; Fay v. Waldron, 3 N. Y. S. 894; Pell v. Baur, 41 N. Y. St. 99, 16 N. Y. S. 258 (affd. 133 N. Y. 377, 31 N. E. 224); Wolf v. Lawrence, 33 Misc. (N. Y.) 481, 67 N. Y. S. 900; Webb v. Hicks, 123 N. Car. 244, 31 S. E. 479; Wood v. Vallette, 7 Ohio St. 172; First Nat. Bank v. Ballard, 19 Ohio C. C. 63, 10 Ohio C. D. 298; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Poundstone v. Hamburger, 139 Pa. 319, 20 Atl. 1054; Price v. Middleton, 75 S. Car. 105, 55 S. E. 156; Boardman v. Keeler, 2 Vt. 65; Spaulding v. Stubbings, 86 Wis. 255, 56 N. W. 469, 39 Am. St. 888; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n; Northern R. Co. v. Patton, 15 U. C. C. P. 332; Martin v. Martin, 1 N. B. Eq. 515; Trustees &c. v. Oland, 35 N. S. 409.

law fixes the legal consequences which flow from them. Neither may one secure the benefits of the relation of a partner and by contract secure immunity from its liabilities as against creditors. But when the contract is susceptible of the construction put upon it by the parties at the time it was made, such construction will be accepted by the courts as the true one."[61]

§ 104. Summary—Profit-sharing evidence of a partnership—Estoppel.—Under the above rule participation in the profits of a business is evidence tending to prove the existence of a partnership.[62] In many cases participation in the profits of a business is considered as presumptive,[63] or prima facie[64] evidence

[61] Fairly v. Nash, 70 Miss. 193, 12 So. 149. See also Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, which holds that every doubt must be resolved in favor of the intent of the parties.

[62] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402; Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Buford v. Lewis, 87 Ark. 412, 112 S. W. 963; Boreing v. Wilson, 33 Ky. L. 14, 108 S. W. 914; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Corey v. Caldwell, 86 Mich. 570, 49 N. W. 611; McAlpine v. Millen, 104 Minn. 289, 116 N. W. 583; Martin v. Cropp, 61 Mo. App. 607; Gibson v. Smith, 31 Nebr. 354, 47 N. W. 1052; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Merchants' Nat. Bank v. Standard Wagon Co., 6 Ohio (N. P.) 264; In re Gibb's Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; In re Darling's Estate, 7 Kulp (Pa.) 323; Badeley v. Consolidated Bank, L. R. 38 Ch. Div. 238, 57 L. J., Ch. 468, 59 L. T. 419, 36 W. R. 745; Ross v. Parkyns, L. R. 20 Eq. 331, 30 L. T. 331, 44 L. J., Ch. 610, 24 W. R. 5; Ex parte Tennant L. R. 6 Ch. Div. 303, 37 L. T. 284, 25 W. R. 854.

[63] Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972; In re Francis, 2 Sawy. (U. S.) 286, Fed. Cas. No. 5031; Buford v. Lewis, 87 Ark. 412, 112 S. W. 963; Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823; Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918; Price v. Middleton, 75 S. Car. 105, 55 S. E. 156; Cothran v. Marmaduke, 60 Tex. 370; Bentley v. Brossard, 33 Utah 396, 94 Pac. 736; Pooley v. Driver, L. R. 5 Ch. Div. 458, 46 L. J., Ch. 466, 36 L. T. 79, 25 W. R. 162.

[64] Blair v. Shaeffer, 33 Fed. 218 (revd. 149 U. S. 248, 37 L. ed. 721, 13 Sup. Ct. 856); In re Ward, 2 Flip (U. S.) 462, Fed. Cas. No. 17144; Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823; Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Philips v. Samuel, 76 Mo. 657; Glore v. Dawson, 106 Mo. App. 107, 80 S. W. 55; Goddard-Peck Grocery Co. v. Berry, 58 Mo. App. 665; Roper v. Schaefer, 35 Mo. App. 30; Waggoner v. First Nat. Bank, 43 Nebr. 84, 61 N. W. 112;

of a partnership.[65]

A great deal of confusion has arisen on this branch of the subject through a careless use of language on the part of the courts. They frequently state that two or more persons may be partners as to third persons and not as to each other; this is incorrect. If not partners inter se they are not partners at all. What is meant is that they have made themselves liable as if they were partners. This happens when one holds himself out as a partner or is with his knowledge or consent held out as such to the knowledge of the one who seeks to take advantage of it. The liability of such a person rests upon the doctrine of estoppel.[66]

Lefevre v. Silo, 112 App. Div. 464, 98 N. Y. S. 321; Kootz v. Tuvian, 118 N. Car. 393, 24 S. E. 776; Boston &c. Smelting Co. v. Smith, 13 R. I. 31, 43 Am. Rep. 3; Robinson v. Allen, 85 Va. 721, 8 S. E. 835; Walker v. Hirsch, L. R. 27 Ch. Div. 460, 54 L. J., Ch. 315, 51 L. T. 581, 32 W. R. 992.

[65] When it is said that there must be a joint ownership of the profits of a business this must not be confused with a joint ownership of the capital used in the business. Thus joint ownership of the property may merely create a tenancy in common but not a partnership. La Cotts v. Pike, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48. See also Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327; Parkhurst v. Kinsman, 1 Blatchf. (U. S.) 488, Fed. Cas. No. 10757 (affd. 18 How. 289, 15 L. ed. 385); Thorndike v. De Wolf, 6 Pick. (Mass.) 120; Murphy v. Craig; 76 Mich. 155, 42 N. W. 1097; Baldwin v. Burrows, 47 N. Y. 199. One distinction between joint tenants and partners is that as between the latter there is no right of surviorship. Cowles v. Garrett, 30 Ala. 341; Bradley v. Harkness, 26 Cal. 69; La Societe Francaise v. Weidmann, 97 Cal. 507, 32 Pac. 583; Sims v. Dame, 113 Ind. 127, 15 N. E. 217; Goell v. Morse, 126 Mass. 480; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Farrand v. Gleason, 56 Vt. 633; Hungerford v. Cushing, 8 Wis. 332. The difference between a co-tenancy and a partnership is found mainly in the termination of their relation and the methods by which a partner and a co-tenant may dispose of their separate interests.

[66] Fechteler v. Palm, 133 Fed. 462, 66 C. C. A. 336; Alabama Fertilizer Co. v. Reynolds, 85 Ala. 19, 4 So. 639; Jowers v. Phelps, 33 Ark. 465; Omaha &c. Smelting & Ref. Co. v. Rucker, 6 Colo. App. 334, 40 Pac. 853; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217n; Barnett Line Steamers v. Blackmar, 53 Ga. 98; Reynolds v. Radke, 112 Ill. App. 575; Strecker v. Conn, 90 Ind. 469; Sherrod v. Langdon, 21 Iowa 518; Rider v. Hammell, 63 Kans. 733, 66 Pac. 1026; Green v. Taylor, 98 Ky. 330, 17 Ky. L. 897, 32 S. W. 945, 56 Am. St. 375; Grieff v. Boudousquie, 18 La. Ann. 631, 89 Am.

Dec. 698; Rice v. Barrett, 116 Mass. 312; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Sargent v. Collins, 3 Nev. 260; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54 (modified 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136); Vibbard v. Roderick, 51 Barb. (N. Y.) 616; Clark v. Rumsey, 59 App. Div. (N. Y.) 435, 69 N. Y. S. 102 (appeal dismissed in 178 N. Y. 592, 70 N. E. 1097); Heye v. Tilford, 2 App. Div. 346, 73 N. Y. St. 428, 37 N. Y. S. 751 (affd. 154 N. Y. 757, 49 N. E. 1098); W. D. Wilson Printing Ink Co. v. Bowker, 27 Abb. N. Cas. (N. Y.) 153, 39 N. Y. St. 690, 15 N. Y. S. 293; Shafer v. Randolph, 99 Pa. St. 250; Polk v. Buchanan, 5 Sneed. (Tenn.) 721; Grabenheimer v. Rindskoff, 64 Tex. 49; Cottrill v. Van Duzen, 22 Vt. 511.

CHAPTER IV

ESSENTIAL ELEMENTS AND NATURE OF A PARTNERSHIP

SECTION

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127. Distinction between partnership and corporation.
128. Distinction between partnership and trust.

§ 110. Essential elements.—Among the essential elements of actual partnership, at least in the absence of stipulations to the contrary, may be enumerated the following: 1. Profit sharing (including purpose of profit). 2. Sharing of loss. 3. Intention to form partnership. 4. Mutual agency. 5. Community of interest, or common business. It may appear, upon first view, that the present chapter must, of necessity, be simply a repetition of the preceding chapter, at least as to the first three essentials above given, but it will be readily seen, upon further examination, that, although dealing with the same subjects, it is nevertheless from a different angle, and touches principles which could not properly be discussed from the viewpoint of a test of partnership. For example, sharing of profits, as we have seen, is, in some jurisdictions, held in itself to be a conclusive test of partnership. On the other hand, under the present

discussion, it is simply one element, although an essential one, while sharing of losses, although, in the absence of a contrary agreement, it must be an element of partnership, can not by any possibility be, in itself, a test thereof. With this preliminary digression and explanation, we will proceed with the subject as outlined.

§ 111. **Sharing of profits.**—To the extent that the law governing this matter is discussed under the heading of Tests, it will be dispensed with here, and only that phase of the subject will now be touched upon which is peculiar to this chapter. Regardless of the fact as to whether profit sharing, intention or other matters, are regarded as tests in any particular jurisdiction, all, perhaps, hold profit sharing to be an essential element of partnership. How universally this proposition is accepted is shown by the definitions of the leading text writers upon this subject, among whom may be mentioned Dixon, Parsons, Pollock, Chancellor Kent, Pothier, Burdick, and Lord Justice Lindley. Both of the latter two, while not giving a formal definition, nevertheless recognize and adhere to the principle in their discussion of the subject. In all the codes which the author has been able to examine, which define the relation, the sharing of profits is expressly made an element thereof, thus necessarily implying a view and purpose of profit.[1] In an Oklahoma case[2] it was said: "No definite rule has ever yet been laid down which can be said to be a conclusive test as to whether or not a partnership exists inter sese from a given state of facts, but there must be, to constitute the same, (a) an intent on the part of the alleged partners to form a partnership; (b) there must be a participation generally in both profits and losses; (c) there must be such a community of interests as enables each party to make contracts, manage the business, and dispose of the whole property." There are also decisions in many, if not all, states, which

[1] See § 25 ante. While the elements of profit sharing alone and of itself does not establish a partnership, it is essential to a partnership. Westcott v. Gilman (Cal.), 150 Pac. 777.

[2] Municipal Paving Co. v. Herring (Okla. 1915), 150 Pac. 1067.

affirm the rule that there must be a purpose of profit. A Michigan case[3] has held that an association, doing no business involving profit and loss, is not a partnership, and the members thereof are not personally liable on contracts made by its officers. However, if the members actively participate in the incurring of the debts, or authorize certain officers to so incur the debts, all members so participating or authorizing are liable as partners.[4] It is to be observed, however, that, in the cases here cited which hold that there is partnership liability under certain conditions, there is no conflict with the rule holding that there must be a view of profit to constitute partnership, as it is not the association that creates the liability, but the individual act of each party held.

§ 112. **Sharing of loss.**—It has already been discovered that sharing of loss merely is not made a test of partnership, yet it is one of the essentials of a partnership as between the partners, in the absence of an agreement to the contrary, and of partnership liability as to third persons, in their lack of knowledge of such an agreement. It is, perhaps, unnecessary here to go into detail upon this question, as the principle is too elementary to be questioned. In fact, the great majority of the cases on the subject are for the purpose of enforcing this rule, and fixing, first, the partnership relation, and, second, the liability for losses which necessarily follows the partnership relation, with, of course, the exception mentioned above.

§ 113. **Intention.**—Intention has, as already shown, been made a test of partnership liability in many jurisdictions. In perhaps all jurisdictions, regardless of tests, it is considered a material element of actual partnership.[5] However, it is held not essential to create partnership liability as to third persons, that the parties actually intended to form a partnership,[6] or knew that

[3] Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716.

[4] Sproat v. Porter, 9 Mass. 300; Richmond v. Judy, 6 Mo. App. 465; Ferris v. Thaw, 5 Mo. App. 279; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344; Devoss v. Gray, 22 Ohio St. 159; Ridgely v. Dobson, 3 Watts & S. (Pa.) 118.

[5] Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[6] Freeman v. Huttig Sash &c. Co.

their contract in law created a partnership.[7] And it must be remembered that intention may be inferred from the acts done, and the acts may sometime create a partnership, although the parties did not think they would have that effect.

§ 114. **Mutual agency.**—Mutual agency, as an essential element of partnership, holds much the same relative position as does sharing of loss. It is not a real test of partnership, as there may be mutual agency without any partnership relation, and yet in the absence of agreement to the contrary, mutual agency is presumed. It is not meant that a partner has an unlimited agency by which to bind his partners to any and all contracts, but only to such contracts, and concerning such transactions, as are within the scope of the partnership business. It is not the purpose to here discuss in detail the law upon mutual agency of partners, as that will be treated more fully under the chapters on Rights and Duties of Partners inter sese. It is enough to say that an interchangeable relation of principal and agent between the parties is indispensable to the existence of a partnership.[8]

§ 115. **Community of interest.**—There are several subdivisions under which community of interest may be treated. 1. There may be community of interest in the partnership property itself, as has been shown above. 2. There may be community of interest in profits. 3. There may be community of interest in profits and losses. The first one of the above is the one chiefly touched upon, under this heading, as the other two are discussed, in a general way, under the general headings bearing their names. It is often said of partnership that it is a common business with a view of profit. As stated in an Arkansas case:[9] "Before there can be a partnership, the parties must have

(Tex.), 153 S. W. 122 (revg. judgment (Civ. App.), 135 S. W. 740).

[7] Westcott v. Gilman (Cal.), 150 Pac. 777.

[8] Croft v. Bain, 49 Mont. 484, 143 Pac. 960; Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[9] Roach v. Rector, 93 Ark 521, 123 S. W. 399 (1909).

joined to carry on a trade or adventure for their common benefit, each contributing property or services, and have a community of interest in the profits as such, and of the property employed in the business." It is well recognized that a community of interest in profits is necessary,[10] but the better rule seems to be that a joint ownership of the property used in carrying on the business is not necessary.[11] Common ownership of property does not of itself create a partnership,[12] even if the property is used for the purpose of making gain,[13] and a mere community of interest in profits is not necessarily sufficient to constitute a partnership, even in those states where the sharing of profits is held a conclusive test of partnership, for they recognize exceptions where a share of profits is taken as compensation for services.[14]

It was said in an Oklahoma case, a joint interest in profits generally gives rise to the relation of partnership, but a common interest in profits does not.[15] A Colorado case[16] gives, as the elements of partnership, community of loss, of expenses, of title and a common right to dispose of property for purposes of a partnership. This classification is at fault, as it would not only appear that all the above were always essential to a partnership, but also that there were other essentials, but it serves to demonstrate that there must be at least a common business with a view of profit. Community of interest, however, is not alone sufficient to prove partnership, or, in other words, is not a test of partnership. Two or more persons may be co-owners of land and not be partners.[17] If, however, they buy land to sell and to share either profits alone or profits and losses, they may be partners.[18] The general rule is well stated in the syllabus

[10] Drake v. Hall, 220 Fed. 905.

[11] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[12] Towers v. Errington, 78 Misc. 297, 138 N. Y. S. 119.

[13] Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363.

[14] Shebley v. Quatman, 66 Ore. 441, 134 Pac. 68.

[15] Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[16] Baldwin v. Patrick, 39 Colo. 347 (1907), 91 Pac. 828.

[17] Bond v. May, 38 Ind. App. 396 (1906), 78 N. E. 260.

[18] Morgart v. Smouse, 112 Md. 615 (1910), 77 Atl. 137.

to an Arkansas case:[19] "A mere community of interest by ownership of property creates a tenancy in common, but not a partnership." The Montana code defines a partnership as "the association of two or more persons to carry on a business together and divide the profits," and it further provides, among other things, that the interest of each member of the partnership extends to every portion of its property, and that every general partner is agent for the firm within the scope of its firm business. In the case of Weiss v. Hamilton[20] it was held that the sharing of profits was not a conclusive test of partnership, but that it was essential that there be a community of ownership in the profits, before a partnership could exist. Therefore, in a contract for the loan of money, upon a certain fixed sum for its use, and with no agreement for profit sharing, there is no resulting partnership, as there was no community of interest in the business.[21] And where there was an association formed to purchase a horse and notes were signed by the members, the horse to be owned by the signers, there is no partnership unless they intended to carry on business together and share in the profits.[22]

§ 116. **Nature—A trust relation.**—That partnership is a trust relation was previously asserted[23] and will again be more fully treated.[24] All the effects of the partnership are held in trust. A partner is a trustee for the other partners and for the partnership, he is the cestui que trust of the other partners.[25] The relationship between partners being fiduciary, the highest degree of good faith between the partners is required.[26]

§ 117. **Partnership as distinct entity.**—There is no other relation known to law which, in its nature, is so complicated as is partnership. A natural person is an entity, and may sue and

[19] La Cotts v. Pike's Estate, 91 Ark. 26 (1909), 120 S. W. 144, 134 Am. St. 48.

[20] 40 Mont. 99 (1909), 105 Pac. 74.

[21] Turregano v. Barnett, 127 La. 620, 53 So. 884 (1911).

[22] Croft v. Bain, 49 Mont. 484, 143 Pac. 960.

[23] See § 23, ante.

[24] See post § 342.

[25] Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97.

[26] See chaps. 13 and 14.

be sued; may receive, hold, and dispose of, real or personal property. A corporation, or artificial person is in the same position, being endowed with a personality by the act which creates it. The question of the entity of a partnership has been repeatedly raised, and answered in different ways. Is the partnership a unit, having a distinctive personality, a self, or is it merely a convenient mode of expressing the association, and the consequent rights and liabilities of the persons so associated therein? The conception of the relation was, as will be shown hereafter, absolutely at variance under the civil and the common law, as declared by the English courts. The American law upon this question is not at all uniform. Many states have passed laws governing the subject, at least in part, usually to the effect of making partnership a distinct entity. Where, however, there are no statutes upon the subject, with the exception of Louisiana, in which state the civil law is the basic law, the rule of the common law is recognized to a certain extent.

The ordinary mercantile conception of a partnership and the legal conception are thus largely at variance. For all practical business dealings, the merchant regards a partnership or firm as an entity, up to the time when he must go to court to enforce a liability against it. Creditors charge the firm on their accounts and the books of the partnership are kept as if it had a separate existence.

§ 118. Partnership held not to be an entity.—In a number of jurisdictions it is declared that the common law does not recognize a partnership as a legal entity, separate and distinct from the several partners therein.[27] Thus, "the law recognizes no

[27] E. I. Du Pont de Nemours Powder Co. v. Jones, 200 Fed. 638; Phillips v. Holmes, 165 Ala. 250, 51 So. 625; Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782; Hallowell v. Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Grimes v. Bowerman, 92 Mich. 258, 52 N. W. 751; In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223 (revg. order 135 N. Y. S. 1131, 150 App. Div. 922); Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473; Strauss v. Frederick, 91 N. Car. 121; Schnei-

personality in a partnership other than that of the persons who compose it;"[28] "partnership is but a relation; it is not a person—it is not a legal being;"[29] "a partnership, as such, can not take or hold the legal title to real estate. It is not a person, either natural or artificial, and when a deed is made to a partnership it passes the title to the individual members thereof as tenants in common."[30] So also, "That citizenship can not rightly be predicated of a copartnership as such * * * is well settled."[31] The fact that dissolution of a firm is worked by the death of a partner,[32] by the sale of one partner of his interest,[33] by the bankruptcy of a partner,[34] or by the marriage of a feme sole partner suggests the correctness of this position.[35] In England the separate-entity nature of a partnership has been denied, at least so far as recognizing a partner as debtor or creditor of the firm of

der v. Sellers, 98 Tex. 380, 84 S. W. 417; Williams Land Co. v. Crull (Tex. Civ. App.), 125 S. W. 339; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415; In re Beauchamp, 1 Q. B. (1894) 1; Ex parte Corbett, L. R. 14 Ch. Div. (1880) 122, 42 L. T. 164, 28 W. R. 569, 49 L. J. Bk. 74; In re Wakeham, L. R. 13 Q. B. Div. 43; Jacaud v. French, 12 East 317, 11 R. R. 390.

[28] Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939.

[29] Harris v. Visscher, 57 Ga. 229.

[30] Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454 (rehearing denied by Sup. Ct. Id. 462); Adams v. Church, 42 Ore, 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. 740.

[31] Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668.

[32] Ruggles v. Buckley, 175 Fed. 57, 27 L. R. A. (N. S.) 541.

[33] Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578.

[34] Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924.

[35] Brown v. Chancellor, 61 Tex. 437. For further evidence in this connection see Bellairs v. Ebsworth, 3 Camp. 53, 13 R. R. 750; Cambridge University v. Baldwin, 5 Mees. & W. 580; Simson v. Cooke, 1 Bing. 452, 8 Moore 588, 2 L. J. (O. S.) C. P. 74; Hollond v. Teed, 7 Hare 50; Strange v. Lee, 3 East 484; Weston v. Barton, 4 Taunt. 673, 13 R. R. 726; Dry v. Davy, 10 Adol. & E. 30, 8 L. J., Q. B. 209, 3 Jur. 315; Wright v. Russel, 2 W. Bl. 934, 3 Wils. 530; Bank of Scotland v. Christie, 8 Clark & F. 214; Stevens v. Benning, 1 Kay & J. 168; Tasker v. Shepherd, 6 Hurl. & N. 575, 30 L. J., Ex. 207, 4 L. T. 19, 9 W. R. 476; De Mazar v. Pybus, 4 Ves. 644; Hole v. Bradbury, 12 Ch. Div. 886, 48 L. J. Ch. 673; Barron v. Fitzgerald, 6 Bing. N. Cas. 201, 8 Scott, 460, 9 L. J., C. P. 153, 4 Jur. 88; Fowler v. Reynal, 2 De G. & Sm. 749, 13 Jur. 649, 650n; Leak v. MacDowall, 3 New Reports 185, 33 Beav. 238; Pease v. Hirst, 10 B. & C. 122, 5 M. & Ry. 88, 8 L. J. (O. S.) K. B. 94; Metcalf v. Bruin, 12 East 400, 2 Camp. 422, 11 R. R. 432; Backhouse

which he himself is a member is concerned.[36] Where the rule that a partnership is not a distinct entity prevails, the title to real estate must not be held in the name of the firm,[37] although, of course, the equitable interest would belong to the partnership. Another rule of usual operation, in the absence of statutes to the contrary, which recognizes the law of nonentity, is, that a change in members works a change in the firm, in reality terminates the old and establishes a new firm.[38]

§ 119. Partnership held to be an entity.—Opposed, however, to the courts adhering to this doctrine that a partnership is not a separate entity there are others which speak in unequivocal terms to the contrary.[39] "There are two conceptions of a partnership, one springing from the agreement on which it

v. Hall, 6 B. & S. 507, 34 L. J., Q. B. 141, 11 Jur. (N. S.) 562, 12 L. T. 375, 13 W. R. 654; Dance v. Girdler, 1 Bos. & P. (N. R.) 34, 8 R. R. 748; Parham Sew. Mach. Co. v. Brock, 113 Mass. 194; White Sew. Mach. Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Equitable Life Assur. Soc. v. Coats, 44 Mich. 260, 6 N. W. 648; Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554; Palmer v. Bagg, 56 N. Y. 523.

[36] Richardson v. Bank of England, 4 Mylne & C. 165, 2 Jur. 911. See further De Tastet v. Shaw, 1 Barn. & Ald. 664. And compare Crouch v. Bowman, 3 Humph. (Tenn.) 209.

[37] Bates Law of Partnership, p. 174.

[38] Haskins v. D'Este, 113 Mass. 356.

[39] Schreiner v. United States, 6 Ct. Cl. (U. S.) 359; Lacey v. Cowan, 162 Ala. 546, 50 So. 281; Williams v. Hurley, 135 Ala. 319, 33 So. 159; Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Floyd v. Boyd (Ga. App.), 84 S. E. 494; Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209; Good v. Jarrard, 93 S. Car. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383n; Morris v. Owen (Tex. Civ. App.), 143 S. W. 227. For recognition of one firm as two distinct entities see West v. Valley Bank, 6 Ohio St. 168. But, as bearing upon the question as to the soundness of the decision in this case just cited, see Campbell v. Colorado Coal &c. Co., 9 Colo. 60, 10 Pac. 248; Adams v. May, 27 Fed. 907; Wright v. Hooker, 10 N. Y. 51, Seld. Notes 216. In Second Nat. Bank v. Burt, 93 N. Y. 233, a group of partners had been transacting business in different localities under different firm names and Ruger, Ch. J., speaking for the court, said: "So far as the liability of such firms is concerned they each constitute legal entities, assuming and performing their respective obligations, and each holding exclusive funds to effect the objects of its association." Further in this connection see In re Haines, 176 Pa. St. 354, 35 Atl. 237.

is founded, that it is an aggregation of persons associated together to share its profits and losses, owning its property, and liable for its debts. The other that it is an artificial being, a distinct entity separate in estate, in rights, and in obligations from the partners who compose it. In most of its relations to persons and things the latter conception is the more accurate."[40] More emphatic than this statement is the declaration that "a partnership * * * is just as distinct and palpable an entity, in the idea of the law, as distinguished from the individuals composing it, as is a corporation; and can contract as an individualized and unified party, with an individual person who is a member thereof, as effectually as a corporation can contract with one of its stockholders. * * * The only practical difference is a technical one, having reference to the forum and form of remedy."[41] "Partnerships in courts of law or in courts of equity, are entities separate and distinct from that of the individuals who compose it, as much as the individuals themselves are separate and dis-

[40] In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886.

[41] Walker v. Wait, 50 Vt. 668. Justice Cooley, in delivering the opinion of the court, in Robertson v. Corsett, 39 Mich. 777, declares that: "The partnership for most legal purposes is a distinct entity;—having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers."

In Curtis v. Hollingshead, 14 N. J. Law 402, it is said: "A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law, and in equity. Its property is first to be appropriated to the payment of its debts. The individual partners are indeed liable and bound to the extent of their separate property for the partnership debts. They may therefore be called debtors, but they are only constructively, or rather consequentially, so."

So, also in Allen v. Davids, 70 S. Car. 260, 49 S. E. 846, the court says: "We must always remember that the partnership is a new entity, and binds everybody who is a party to it, whether known as a party to it at the time or not." Again in Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304, it is said: "A partnership is a distinct entity, having its own property, debts and credits. For the purposes for which it was created, it is a person, and as such is recognized by the law."

tinct persons."[42] "A partnership is a legal entity as well as a corporation, except in a more limited sense."[43]

The civil law, as administered by the courts of Louisiana, regards a partnership once formed and put into action as a "moral being, distinct from the persons who compose it. It is a civil person which has its peculiar rights and attributes. * * * The ideal being, thus recognized by a fiction of law, is the owner" of the partnership property.[43a]

§ 120. **Entity—Change of firm.**—The law touching the legal relations existing upon the change of a firm by the taking from or adding to the partners will be treated in detail under the chapter on Change of Membership, but it is perhaps advisable here, in order to thoroughly inquire into the entity of partnership, to see wherein these principles bear upon each other. The rule is well established that a change in the membership dissolves a partnership. The law holds the relation to be one of particular trust and confidence, and will not consent to binding a person by act of the law, to partnership and the consequent agency, with a person who is not acceptable to him. This is not in harmony with the idea of entity, yet is not wholly opposed to it.

§ 121. **Entity—The true view.**—The differences of opinion as to whether a partnership is an entity are not in fact as radical as they appear, for to each unqualified assertion there should be added the modification that "for certain purposes this fiction (that of a separate entity, for which the nontechnical nomenclature of the mercantile world is originally responsible) may be

[42] Lacey v. Cowan, 162 Ala. 546, 50 So. 281.

[43] Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955.

[43a] Liverpool, B. & R. P. Nav. Co. v. Agar, 4 Woods (U. S.) 201, 14 Fed. 615. See also succession of Pilcher, 39 La. Ann. 362, 1 So. 929 (quoting Smith v. McMicken, 3 La. Ann. 319); In re Arick's Succession, 22 La. Ann. 501; Sherwood v. His Creditors, 42 La. Ann. 103, 7 So. 79; Stothart v. Hardie, 110 La. 696, 34 So. 740; Newman v. Eldridge, 107 La. 315, 31 So. 688.

very properly indulged."[44] The Supreme Court of Indiana has declared that, "Expressions to that effect (a partnership is a legal entity) are not infrequently found in the cases; but it appears clear to us that in thus speaking the courts have referred to partnerships as legal entities merely as a term of accommodation, where there was under consideration some question as to the rights of the partners inter se, or of the derivative rights of creditors growing out of the equities of the partners. Such statements can not be accepted as affording a sufficient foundation for the view that a partnership is not composed of its individual members."[45] So it is said that a partnership, though not strictly a legal entity, distinct from the persons composing it, yet is so commonly regarded as such by men of business that it may be so treated in interpreting a commercial contract.[46]

[44] Red River Valley Cotton Co. v. J. W. Stalcup Mercantile Co., 41 Okla. 34, 136 Pac. 1115; Jones v. Blun, 145 N. Y. 333, 39 N. E. 954. Continuing, Bartlett, J., speaking for the court, says: "In keeping partnership accounts, and in marshaling the assets of an insolvent or liquidating firm, this is constantly done. It can not be invoked, however, to shield the individual partner * * * from the effect of a statute forbidding a preference, or to enable him to do as a partner that which the law prohibits him from doing as an individual."

[45] State v. Krasher, 170 Ind. 43, 83 N. E. 498.

[46] See in Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972 (affg. 29 Fed. 276), which cites approvingly the holding in Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473, and quotes Sir George Jessel, who, in Pooley v. Driver, L. R. 5 Ch. Div. 458, says: "You can not grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." See also Warner v. Smith, 1 DeG. J. & S. 337, 32 L. J. Ch. 573, 8 L. T. 221, 11 W. R. 392; Nichol v. Stewart, 36 Ark. 612; Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748; Henry v. Anderson, 77 Ind. 361; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Hosmer v. Burke, 26 Iowa 353; Johnson v. Smith, Morris (Iowa) 105; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; Cross v. Burlington Nat. Bank, 17 Kans. 336; Victor v. Spalding, 202 Mass. 234, 88 N. E. 846; Chaffee v. Jones, 19 Pick. (Mass.) 260; Robertson v. Corsett, 39 Mich. 777; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Roop v. Herron, 15 Nebr. 73, 17 N. W. 353; Rosenbaum v. Hayden, 22 Nebr. 744, 36 N. W. 147; Curtis v. Hollingshead, 14 N. J. L. 402; Good v. Red River Valley Co., 12 N. Mex. 245, 78 Pac.

The Supreme Judicial Court of Massachusetts takes the intermediate position that, "A partnership is not a legal entity, having as such a domicile, although for purposes of taxation and for other purposes it may be treated by statute as having a locality."[47] The separate-entity theory is, more and more, being given statutory utterance; legislation is more and more providing, at least by implication, that for the accomplishment of certain ends, for instance, the bringing of suits against partnerships, the latter are to be deemed separate entities.[48] In some states the partnership

46; Napier v. Spielmann, 127 App. Div. (N. Y.) 567, 111 N. Y. S. 983; In re Haines, 176 Pa. St. 354, 35 Atl. 237; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; In re Nims, 16 Blatchf. (U. S.) 439, Fed. Cas. No. 10269; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

[47] Faulkner v. Hyman, 142 Mass. 53, 6 N. E. 846.

[48] Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668; Mills v. Fisher, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656n; In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886; Manson v. Williams, 153 Fed. 525, 82 C. C. A. 475; In re Perley, 138 Fed. 927; Williams v. Hurley, 135 Ala. 319; 33 So. 159; Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 So. 800; Opelika v. Daniel, 59 Ala. 211; Sims v. Jacobson, 51 Ala. 186; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; King v. Randlett, 33 Cal. 318; Gilman v. Cosgrove, 22 Cal. 356; Phelps Mfg. Co. v. Enz, 19 Conn. 58; McDonough v. Carter, 98 Ga. 703, 25 S. E. 938; Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; United States Exp. Co. v. Bedbury, 34 Ill. 459; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Ruthven v. Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; Sweet v. Ervin, 54 Iowa 101, 6 N. W. 156; Newlon v. Heaton, 42 Iowa 593; Stockwell v. Brewer, 59 Maine 286; Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. 416; Hoadley v. Essex County, 105 Mass. 519; Williams v. Saginaw, 51 Mich. 120, 16 N. W. 260; McCoy v. Anderson, 47 Mich. 502, 11 N. W. 290; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Dimond v. Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182; Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064; Rosenbaum v. Hayden, 22 Nebr. 744, 36 N. W. 147; Leach v. Milburn Wagon Co., 14 Nebr. 106, 15 N. W. 232; Burlington & Mo. River R. Co. v. Dick, 7 Nebr. 242; Martin v. District Court of First Dist., 13 Nev. 85; Gillig v. Lake Bigler Road Co., 2 Nev. 214; Good v. Red River Valley Co., 12 N. Mex. 245, 78 Pac. 46; Abernathy v. Latimore, 19 Ohio 286; Robinson v. Ward, 13 Ohio St. 293; Haskins v. Alcott, 13 Ohio St. 210; Beers v. Gurney, 7 Ohio C. D. 411; Rice v. Summers, 2 Pa. Dist. Rep. 31; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415; Schweppe v. Wellauer, 76 Wis. 19, 45 N. W. 17;

may sue or be sued in its firm name.[49] In others it may be sued in such name.[50] Under many state tax laws property of a partnership is listed and assessed in the firm name, in the same manner as corporate property in the corporate name.[51] Under some fish and game laws,[52] and anti-trust laws,[53] a partnership, as such, may be fined for the commission of a crime. The present Bankruptcy Act[54] "treats the copartnership as a legal entity, irrespective of the status or the separate rights of the individual copartners. It deals with the copartnership as a person for the purpose of subjecting the partnership property to the satisfaction of copartnership liabilities. * * * And so it has been held that a copartnership may be adjudged a bankrupt after the death of one partner, upon an act of bankruptcy committed by the surviving partner, and that the adjudication of bankruptcy of a copartnership does not necessarily draw into the proceedings the estate of every individual member."[55]

O'Brien v. Foglesong, 3 Wyo. 57, 31 Pac. 1047. And compare Williams Land Co. v. Crull (Tex. Civ. App.), 125 S. W. 339.

[49] Iowa Code, § 3468; 5 Howell's Mich. Stat., § 12217 (only in justice's court); Nebr. Rev. Stat., § 7594; Ohio 5 Gen. Code, § 11260; Wyo. Comp. Stat., § 4329.

[50] Ala. 2 Code, § 2506; Cal. Code Civ. Proc., § 388; 2 Idaho Rev. Codes, § 4112; Minn. Gen. Stat., § 7689; Nev. 2 Rev. Laws, § 5007; Utah Comp. Laws, § 2927; W. Va. Code, § 1976 (only in justice's court); Wis. Stat. (1911), § 2611.

[51] Ark. Kirby Dig. Stat. (1904), § 6903; Ala. 1 Code, § 2108; Ariz. Rev. Stat. (1913), § 4860; Cal. Pol. Code, § 3629 (2) (6); Colo. 2 Mill. Ann. Stat., § 6231; Idaho 1 Rev. Codes, § 1673; Ill. 5 Ann. Stat., § 9219; 4 Burns Ind. Ann. Stat. (1914), § 10162; Iowa Code (1897), §§ 1313, 1317; Mass. Acts (1909), ch. 490, §§ 27, 41, 43; Mich. 1 Howell's Stats., § 1780; Minn. Gen. Stat. (1913), § 1994; Mont. 1 Rev. Codes, § 2521; Nev. 1 Rev. Laws, §§ 3626, 3629; Nebr. Rev. Stat., §§ 6298, 6313; Okla. 2 Rev. Laws, § 7311; Ohio 3 P. & A. Ann. Gen. Code, §§ 5320, 5370; Pa. 5 Purdon's Dig., § 6060; Tex. 3 Civ. Stat., § 7509; W. Va. Code (1906), § 744.

[52] Ohio 1 P. & A. Ann., Gen. Code, § 1462; W. Va. Code Supp. (1909), § 2803, a. 4.

[53] Nebr. Rev. Stat., §§ 4029, 4030; Okla. 2 Rev. Laws, §§ 8222, 8225.

[54] Bankruptcy Act (U. S. Comp. Stat. 1901, p. 3424).

[55] In re Stein, 127 Fed. 547, 62 C. C. A. 272. See also British Partnership Act, 1890, § 4. Chemical Nat. Bank v. Meyer, 92 Fed. 896 (affd. 98 Fed. 976, 39 C. C. A. 368); In re Meyer, 98 Fed. 976, 39 C. C. A. 368; Loveland Bankruptcy (4th ed.), § 255; Collier, Bankruptcy (8th ed.) 146; 13 Columbia Law Rev. 143.

The conference of commissioners on uniform state laws, when they prepared the Sales Act, section 76 (1), the Bills of Lading Act, section 49, and the Warehouse Receipts Act, section 58, included partnerships within their definition of "persons." The question was viewed from different standpoints by the civil and common law. By the civil law it was held to be an entity, as a separate person, distinct from the parties composing it, even allowing suits between it and the partners composing it, while the common law repudiates this distinction, holding it to be simply an association of individuals, with no rights or liabilities aside from those of the partners composing it. Equity has taken a middle ground, recognizing certain conditions thereunder as disclosing an entity, and in other matters disallowing this theory.[56]

Inasmuch as partnership problems are largely adjudicated by courts of equity, the idea of a limited entity is gradually growing, even in our common law states, and this influence is particularly shown in several of our states where laws have been passed, affirmatively establishing the principle of firm entity, at least in certain matters. Undoubtedly, the general American rule of the present day is, that, for certain purposes, the firm is an entity, yet it is not an entirely separate entity, as, for example, a corporation, for, in probably all jurisdictions, there is a curious admixture of rights and liabilities existing between the firm and the members thereof, which could not exist were the firm a separate and distinct being in all matters. From the commercial viewpoint, and that of the persons composing a partnership, it may be said that their activities connected with the partnership are considered as a group of activities dissociated from the other activities of the persons composing it, and this is all that is meant by saying that a firm is recognized commercially as an entity.

§ 122. **Entity—Codes of other nations.**—Under Roman law a partnership was not an entity.[57] Under the old law mer-

[56] Hosmer v. Burke, 26 Iowa 353; Chaffee v. Jones, 19 Pick. (Mass.) 260.

[57] 2 Roby Roman Private Law 132. See generally on subject of entity 22 Harv. L. Rev., §§ 762 et seq.

chant it was an entity, the members of a firm being bound in solido.[58] The codes of the countries following the civil law treat a partnership as a legal entity, or juristic person. Under the German[59] and Swiss[60] codes, a partnership can contract in its firm name, sue and be sued. The Japanese code declares a partnership to be a juristic person.[61] The French courts treat a partnership as a legal person.[62] The codes of Belgium,[63] Spain,[64] Chile[65] and Mexico[66] expressly declare a partnership to be a juristic person, while Italy,[67] Roumania,[68] and Portugal[69] declare the same rule so far as third persons are concerned. In Russia,[70] and Scotland,[71] it is likewise so treated.

§ 123. **Entity—Uniform Partnership Act.**—The Uniform Partnership Act was first drafted on the theory that a partnership is an entity,[72] but as subsequently drafted upon reconsideration and finally approved, this act substantially adopted the common-law theory that a partnership is not an entity, although recognizing it as such for some purposes.[73] Under section two the term "person" is defined as including a partnership. Under section eight (3), the partnership may take title to real estate and convey it in the firm name. By section nine (1), a partner is the agent of the partnership, and in other ways a partner is given certain

[58] Mitchell, Early History of Law Merchant, 124-140, same printed as early forms of partnerships, 3 Select Essays Anglo-American Legal History 183.

[59] Handelgesetzhich (1897), § 124, Platt's transalation; Lehman, Handelsrecht (2d ed.) 293 pf.; Gaveis, Handelgesetzhich, 124 (1).

[60] Code des obligations (1911), § 559.

[61] Commercial Code (1899), §§ 43, 44, Young's transalation.

[62] 1 Planiol, Droit Civil (6th ed.), § 2500, (2d ed.), § 1957.

[63] Code de Commerce (1873), LX, art. 2.

[64] Code de Commerce (1885), § 116.

[65] Code de Commerce (1865), § 348.

[66] Code de Commerce (1889), § 90.

[67] Code de Commerce (1882), § 77.

[68] Code de Commerce (1887), § 78.

[69] Code de Commerce (1888), § 108.

[70] Code de Commerce (1893), Tshernow's Translation, § 21.

[71] Rell Laws Scotland (6th ed.), § 357, Eng. Partnership Act 1890, § 4 (2).

[72] Rep. Com. Uniform State Laws (1905), § 29; Rep. Amer. Bar Assn. (1905), § 738.

[73] Rep. Com. Uniform State Laws (1911), § 149; Rep. Am. Bar. Assn. (1911), § 827.

rights and powers with respect to the partnership.[74] In practical effect this act takes the middle ground as to entity, which is discussed in section one hundred twenty-one on "Entity, the true view."

Under the entity theory, the partnership being a legal person, distinct from the members of the firm, the rules of law applicable are very much those of the law of corporations, and a partnership becomes, in fact, a quasi-corporation. This theory overcomes some of the more technical rules connected with the joint ownership and joint liability inseparable from the common-law or aggregate rule. But the general adoption of a code recognizing a partnership as an entity for all purposes, would be to overthrow a great part of the established partnership law of this country, in fact, to break up its fundamental basis, of joint liability. It would also hinder creditors, since they would then have direct rights only against the partnership as such, and not against the individuals, who could only be reached indirectly as contributory to the partnership.[75]

§ 124. Distinction between partnership and joint purchase.—Usually the joint purchasers of goods,[76] or land,[77] are not held to be partners merely by virtue of that fact, for here only the one essential exists, community of interest, and neither mutual agency, intention to form a partnership, or the sharing of profits and losses, necessarily exists. But where the lands,[78] or goods,[79] are to be resold and the profits divided, in many

[74] See Uniform Partnership Act, Appendix.

[75] See article by Samuel Willeston, 63 U. P. Law Rev. (Am. Law Reg.), § 196.

[76] Jackson v. Robinson, Fed. Cas. No. 7144, 3 Mason (U. S.) 138; Humphries v. McGraw, 5 Ark. 61; Post v. Kimberly, 9 Johns. (N. Y.) 470; Brady v. Colhoun, 1 Pen. & W. (Pa.) 140.

[77] Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327; Breen v. Arnold, 157 Wis. 528, 147 N. W. 997. See cases cited in notes 28, 35, § 169.

[78] See §§ 159, 169.

[79] Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Hillman v. Roney, 78 Ill. App. 412; Bryant v. Fitzsimmons, 106 Md. 421, 67 Atl. 356; Thorp v. Marsh, 40 Miss. 158; Jones v. Walker, 51 Misc. 624, 101 N. Y. S. 22.

cases, the joint purchasers are held partners. Thus, it has been held that a father and son who on one part traded for goods, were chargeable as partners in such transaction, whether they were dealing as partners or copurchasers.[80]

§ 125. Partnership distinguished from joint tenancy and tenancy in common.—There are some similarities between partnership, and joint tenancy and tenancy in common. Tenancy in common is the holding of an estate in land by several persons by several and distinct titles.[81] Joint tenancy is where a single estate in property is owned by several persons under one instrument or act of the parties. In joint tenancy there are the unities of interest, title, time and possession, and there is a right of survivorship.[82] Neither of these relations necessarily involves a partnership. A mere common interest in or common ownership of property does not make persons partners unless they have agreed and intended so to be.[83] Co-owners or joint tenants using their property together for profit may become partners.[84] In some cases it is very difficult to determine whether co-owners or joint tenants have made themselves partners, or remain liable merely in their original relation.[85] There are, however, several essential differences. A partnership is the creature of contract, a cotenancy need not be. One cotenant can dispose of his individual interest to whomsoever he pleases, and his cotenants can not interfere, while the disposal of one partner's interest can not be made without the consent of his copartners. One cotenant is not the agent for the others, and generally speaking, can not bind the others by his contracts with regard to the common property. A cotenant may at any time have a partition of the common property as a matter of right, and the co-owner of personal

[80] Short v. Thomas, 178 Mo. App. 400, 163 S. W. 252. See Pierson v. Steinmyer, 4 Rich. L. (S. Car.) 309.

[81] 38 Cyc. 3.

[82] 23 Cyc. 483, 484.

[83] Story Partnership, §§ 2, 3, 32; Millett v. Holt, 60 Maine 169; Porter v. McClure, 15 Wend. (N. Y.) 187; Hawley v. Keeler, 53 N. Y. 114; Butler Sav. Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163, 39 Am. St. 665.

[84] McFarlane v. McFarlane, 82 Hun (N. Y.) 238, 31 N. Y. S. 272, 63 N. Y. St. 589.

[85] Goell v. Morse, 126 Mass. 480.

property which is severable may at any time take his share without formality. It is necessary to dissolve a partnership in order to divide the property. These are the most important differences in the relations between partners and co-owners.[86] One great distinction between joint tenancy and partnership is that there is no right of survivorship between partners.[87] Co-owners who share gross returns are not partners.[88]

§ 126. Distinction between partnership and relation of landlord and tenant.—There is an appreciable distinction between the relation of landlord and tenant and that of partners.[89] As has been seen in a former section, where one takes charge of and operates a business or manufacturing plant, under a contract by which he pays a portion of the profits to the owner for its use, there may be a question as to whether he is a partner, or a tenant.[90] If the owner's compensation is merely to be measured by a portion of the profits, he is not held a partner,[91] nor is he a partner where he does not share losses,[92] nor where he reserves no control over the premises.[93] Ordinarily a contract with a land owner by an employé to cultivate land for a share of the crop does not create a partnership relation.[94] In such contracts there is no mutual agency and the business is not carried on on joint

[86] See Lindley Partnership (8th ed.), pp. 33 et seq. for extended note as to the remedies existing between co-owners.

[87] Cowles v. Garrett's Admrs., 30 Ala. 341; La Societe Francaise, &c. v. Weidmann, 97 Cal. 507, 32 Pac. 583; Bradley v. Harkness, 26 Cal. 69; Sims v. Dane, 113 Ind. 127, 15 N. E. 217; Goell v. Morse, 126 Mass. 480; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Farrand v. Gleason, 56 Vt. 633; Hungerford v. Cushing, 8 Wis. 332.

[88] Quackenbush v. Sawyer, 54 Cal. 439.

[89] Norton v. Wiswall, 26 Barb. (N. Y.) 618.

[90] See § 79, ante, on profits as rent.

[91] Norton v. Wiswall, 26 Barb. (N. Y.) 618; Heimstreet v. Howland, 5 Denio (N. Y.) 68; Prestons v. McCall, 7 Grat. (Va.) 121.

[92] Barghman v. Portman, 12 Ky. L. 342, 14 S. W. 342; Smith v. Hubert, 83 Hun (N. Y.) 503, 31 N. Y. S. 1076, 65 N. Y. St. 16.

[93] Ault Woodenware Co. v. Baker, 26 Ind. App. 374, 58 N. E. 265.

[94] Christian v. Crocker, 25 Ark. 327, 99 Am. Dec. 223; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Shrum v. Simpson, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792; Frout v. Hardin, 56 Ind. 165, 26 Am. Rep. 18; Musser v. Brink, 68 Mo. 242; Donnell v. Harshe,

account.[94a] However, if the parties have entered into an agreement by which they are jointly concerned in the cultivation of the land, one furnishing the land and farming implements, and the other furnishing labor and directing the operations, and they divide profits and share expenses, such an agreement shows an intention to constitute a partnership, and they will be held partners.[95]

§ 127. Distinctions between partnership and corporation. —There are two ordinary forms of association of several persons for the conduct of business, the partnership, and the corporation. The corporation is an artificial person, created only by legislative authority, its foundation being the charter granted by the state.[96] A partnership is created by contract between its members. The persons composing a corporation are only liable for the amount of their investment, or the amount fixed by statute.[97] Each partner is liable individually for all partnership obligations. The capital of a corporation consists of a number of shares, represented by stock certificates, which may be transferred by indorsement, without the consent of the corporation.[98] All interests in a partnership are so merged together, that there can be no transfer without a dissolution of the firm, or the consent of all the partners. A cor-

67 Mo. 170; Perrine v. Hankinson, 11 N. J. L. 181; Gregory v. Brooks, 1 Hun (N. Y.) 404, 3 Thomp. & C. 517; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Day v. Stevens, 88 N. Car. 83, 43 Am. Rep. 732; Brown v. Jaquette, 94 Pa. St. 113, 39 Am. Rep. 770; note 115 Am. St. 437.

[94a] Cedarberg v. Guernsey, 12 S. Dak. 77, 80 N. W. 159.

[95] Leavitt v. Windsor Land Inv. Co., 54 Fed. 439, 4 C. C. A. 425; Tibbatts v. Tibbatts, Fed. Cas. No. 14020, 6 McLean 80; Autrey v. Frieze, 59 Ala. 587; McCrary v. Slaughter, 58 Ala. 230; Somers v. Joyce, 40 Conn. 592; Adams v. Carter, 53 Ga. 160; Holifield v. White, 52 Ga. 567; Holmes v. Old Colony R. Co., 5 Gray (Mass.) 58; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Taylor v. Bradley, 39 N. Y. 129, 1 Abb. Dec. 363, 100 Am. Dec. 415; Curtis v. Cash, 84 N. Car. 41; Reynolds v. Pool, 84 N. Car. 37, 37 Am. Rep. 607; Lewis v. Wilkins, 62 N. Car. 303; Ambler v. Bradley, 6 Vt. 119; 32 Cent. Dig. L. & T., §§ 1351, 1355.

[96] Thompson Corp., §§ 9, 11; Cook Corp., § 1.

[97] Cook Corp., §§ 241, 242; Thompson Corp., § 5; 10 Cyc. 146; Thompson Corp. (2d ed.), §§ 4315, 4327.

[98] Cook Corp., §§ 11, 12.

poration is controlled by directors, for whom the stockholders vote, each having voting power in proportion to the number of shares he holds, and the directors have authority over the property and business, and appoint the agents and officers. The stockholders as individuals have no authority, except that a majority at a stockholders' meeting may elect directors and exercise some general control over the management.[99] In a partnership, each partner is a full agent within the scope of the partnership business, for the partnership, and for each of the other partners, and contracts made by him bind all the associates. The corporation is a continuous organization unaffected by any transfer of the stock, or the death, insanity or insolvency of its members.[1] The death, insanity, or insolvency of a partner, or the transfer of the interest of one partner to another person causes either the dissolution or re-organization of the firm. A corporation has a separate entity, does business in its corporate name, and can sue and be sued by such name. It can sue its stockholders, and its stockholders can sue it.[2] As a general rule a partnership has no separate entity, but all the partners must sue and be sued by their own names, and a partnership can neither be sued by one of the members, or bring suit against any one of them. The member of a partnership takes on himself much greater liabilities than the member of a corporation and correspondingly, has much greater powers to bind his associates. For these reasons, the personal character of the members of a partnership is of very great importance to other members.

§ 128. Distinction between partnership and trust.—The question sometimes arises as to whether property held by trustees for the benefit of the owners is trust or partnership property. It was said in a Massachusetts case:[3] "A declaration of trust or other instrument providing for the holding of property by trus-

[99] Thompson Corp. (2d ed.), §§ 4460, 4477; Cook Corp., § 11.

[1] Thompson Corp., § 9; Cook Corp., § 11.

[2] Thompson Corp., § 8; Cook Corp., § 11.

[3] Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

tees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership, whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders a trust is created; but if they are subject to the control of the certificate holders, it is a partnership." The reasoning in this case was based on an earlier decision,[4] in which the subject was treated at length, and the court said, in part: "Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and because (2) as a matter of convenience (if not of necessity in case of transferable and transmissible certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent, who for the principal's convenience holds the legal title to the principal's property."[5] In that case it was held that the property involved was trust property, because it was the property of the trustees, to be managed for the benefit of the certificate holders, but to be managed by the trustees and not the certificate holders. Where trustees of association property did not act independently, but under the stockholders' control it was held a partnership and not a trust.[6]

[4] Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

[5] Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

[6] Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

CHAPTER V

KINDS OF PARTNERS AND PARTNERSHIPS

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§ 135. **Partners.**—There are several classes of partners, each having distinct rights and liabilities. The following classification embraces the principal kinds: (1) General partners, (2) Special partners, (3) Nominal partners, (4) Dormant partners, (5) Silent partners.

§ 136. **General partners.**—General partners are full partners, those usually met with in common business life, with mutual agency and the other ordinary incidents of an ordinary partnership. As the principles of partnership as treated in general in this work, are also the principles governing general partners, when not otherwise specified, it would be superfluous to attempt a detailed discussion of the subject here, but attention is directed to the whole general treatment of the subject in this work.

§ 137. **Special partners.**—A special partner is one who has not full partnership liability, his liability being limited by agreement with his co-partners. Only in limited partnerships can a special partner avoid liability to third parties. These can only be formed under statutory authorization and must have at least one general partner. The special partner does not take any active part in the business, and does not incur liability beyond his investment. If he actively takes part in the business or if the attempt to create a limited partnership does not follow closely the prescribed statutory formalities, the special partner is usually liable as a general partner. The entire subject of limited partnership is treated in a subsequent chapter.

§ 138. **Nominal or ostensible partners.**—A nominal, or, as sometimes designated, ostensible, partner, is a person who may not be an actual member of the firm, or who may be a special partner, and who holds himself out, or permits himself to be held out, as a general partner. In such a case, he becomes liable as such general partner, to any one dealing with the firm upon such representation, as if he were such a partner, although he may not be so liable to other creditors to whom he has not been so held out.[1] The term, as used, is, in reality, a misnomer, as there is, thereby, no partnership created, but only partnership liability by estoppel. The party held, has not, at least by the act which creates the liability, made himself a member of the firm, but has estopped himself from denying the relation. This is demonstrated in certain cases,[2] which hold that one who is merely a nominal partner with another is not disqualified from acting as a witness for such other person, on account of interest. The question arises, when the term, "& Co." is used to indicate a

[1] Parsons Partnership (3d. ed.), p. 30; Herman Kahn Co. v. Bowden, 80 Ark. 23, 96 S. W. 126, 10 Ann. Cas. 132; Poole v. Fisher, 62 Ill. 181; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Lancaster &c. Bank v. Boffenmyer, 162 Pa. St. 559, 29 Atl. 855. See long list of cases cited in 10 Ann. Cas., pp. 135, 136. Contra: Young v. Axtell (cited in Waugh v. Carver, 2 H. Bl. 242); Poillon v. Secor, 61 N. Y. 456.

[2] Parsons v. Crosby, 5 Esp. 199; Mawman v. Gillett, 2 Taunt. 325, 11 R. R. 597.

person not designated by name in the firm title, whether the person so designated is a dormant or a nominal partner. It has been held that he is sufficiently indicated, at least by inference, to be a nominal partner.[3] If, however, there are two or more partners covered by the general designation, "& Co.," one or more of them may be dormant, if there was an intention therefor, and if, in fact, he was unknown to the public.[4] Some early cases held that if there was no firm name or general designation as "& Co.," which covered all the partners, all not so designated should be considered dormant partners.[5]

Mr. Bates, in his work on Partnership criticises this rule, inasmuch as it would make all partners in a partnership with a fictitious name dormant partners, and a review of the late cases cited herein will probably not carry out the old rule. The nominal partner is not liable to a creditor who did not know that he was held out as a partner.[6] When a partnership business has been incorporated, its members have sometimes been held liable as partners, where those dealing with the concern were not notified of the incorporation.[7]

§ 139. **Dormant or secret partners.**—A dormant partner is, in reality, the converse of the nominal partner, being, in fact, an actual partner, yet not known as such, and taking no active part in the management of the firm business. It is a comparatively simple matter to fix the liability of the nominal partner, as his holding out in itself raises an estoppel upon him. More difficult questions are raised as to the status of the dormant partner,

[3] Goddard v. Pratt, 16 Pick. (Mass.) 412.

[4] Metcalf v. Officer, 2 Fed. 640, 1 McCrary (U. S.) 325; Warren v. Ball, 37 Ill. 76; Grosvenor v. Lloyd, 1 Metc. (Mass.) 19.

[5] Bank of St. Mary's v. St. John, 25 Ala. 566; Mason v. Connell, 1 Whart. (Pa.) 381.

[6] Thompson v. First Nat. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. ed. 507; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136 (modified 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136).

[7] McGowan v. American &c. Tan Bark Co., 121 U. S. 575, 7 Sup. Ct. 1315, 30 L. ed. 1027; Wechselberg v. Flour City Nat. Bank, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470.

as, usually, the third person enters into his relations with the firm without knowing of the dormant partner's connection with it. The question of liability is raised in several ways. Where the firm property is disposed of by the known partner or partners, it has been held that the dormant partner is estopped from contesting the validity of a mortgage given by the known partner on the firm realty, he allowing the public to believe that the known partner is the sole owner of the business and realty, provided the mortgagee, at the time the mortgage was taken by him, had no notice of the true facts in the matter.[8] The question further arises, in a different form, when the active partner incurs indebtedness, and the creditor thereafter learns of the connection of the dormant partner, and seeks to enforce the liability against him. Here, also, the principle is well established that the dormant partner is liable. The rule is well stated in a federal case,[9] which holds that persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit, are equally liable when discovered, with the ostensible and actual owner, to all creditors of the firm whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relation between the parties at the time the credit was given, and that liability exists, notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. A study of the various cases upon this question will show the above statement to be in accord with the great majority of these cases.[10] The term "secret partner" is sometimes used as synonymous with "dormant partner," and sometimes in a slightly different and

[8] Taylor v. Cummer Lumber Co., 59 Fla. 638, 52 So. 614.

[9] Bigelow v. Elliott, Fed. Cas. No. 1399, 1 Cliff. (U. S.) 28.

[10] Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Berthold v. Goldsmith, 24 How. (U. S.) 536, 16 L. ed. 762; Phillips v. Nash, 47 Ga. 218. See also Gilmore v. Merritt, 62 Ind. 525; Bromley v. Elliott, 38 N. H. 287, 75 Am. Dec. 182; Elmira &c. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541; North v. Bloss, 30 N. Y. 374. Contra: Cochran v. Anderson County Nat. Bank, 83 Ky. 36, 6 Ky. L. 168.

broader sense. In the American and English Encyclopædia of Law the following definition of dormant partner is given: "A dormant partner is one who takes no active part in the business, and whose name does not appear in the title of the partnership, and who is unknown to those who give credit to the firm." The same work designates a secret partner as, "one who participates in the business but keeps his relations with the firm a secret," thus making participation or non-participation in the business the distinction between the two, while later in the discussion of the cases, the distinction is practically obliterated, several cases being cited to the effect that a domant partner may act as clerk or agent.[11]

Mr. Lindley describes a dormant partner simply as, "a partner taking no part in the management of the partnership," and yet later in his work on the subject he says: "If, however, a lender stipulates for more than this (e. g., for a right to control the business or the employment of the assets, or to wind up the business), * * * he ceases to be a mere lender, and becomes a dormant partner." In the case of Metcalf v. Officer[12] it is held that it is sufficient to make a partner dormant if he is not an ostensible partner, while another federal case,[13] held that "secret partnership" means that partnership where the existence of certain persons as partners is not made known to the public by any of the partners. It will be seen that these text books and cases, while recognizing, perhaps, some difference between the secret and the dormant partner, nevertheless, in a final analysis, make but little, if any, actual distinction between the two. Probably the correct solution of the matter would be that secret partnerships are divided into two classes, those in which the secret partner is active, and those in which he is not active, the latter being known as dormant, and the former being loosely spoken of as secret, in a limited sense. A person may be ostensible as to cer-

[11] Waite v. Dodge, 34 Vt. 181; How v. Kane, 2 Pin. (Wis.) 531, 2 Chand. 222, 54 Am. Dec. 152.

[12] 2 Fed. 640.

[13] United States Bank v. Binney, Fed. Cas. No. 16791, 5 Mason (U. S.) 176.

tain persons who know his connection with the firm, and still be dormant as to the public at large.[14]

§ 140. Silent partners.—Silent partners, or sleeping partners, as they are often spoken of, are those members of the firm, who, while actually partners, and known to the world as such, nevertheless take no part whatsoever in the management of the business. Their liabilities, as a rule, are the same as those of the active partners, or, at least, their position as silent partners would not, of itself, usually create any different liability.

§ 141. Kinds of partnerships.—There are several different kinds of partnerships. The old classification made three divisions, relating to their scope, as follows: Universal, General, Special. Classification along other lines might be made, as, for instance, (1) Limited partnerships, (2) Joint stock companies, (3) Partnership associations, (4) Mining partnerships, (5) Trading partnerships, (6) Non-trading partnerships, (7) Sub-partnerships, (8) Legal or illegal partnerships. There are still other relations which are not, strictly speaking, partnerships, and yet which may result in obligations similar to partnership relations, and these relations will be considered in this chapter, owing to their close connection hereto. Among them might be enumerated, (1) Defective corporations, (2) Unincorporated associations, (3) Partnership by representation, (4) Joint ownership, (5) Joint adventure. These relations will be considered in detail after a review of the various kinds of partnerships above designated.

§ 142. Universal partnerships.—As has been previously pointed out herein,[15] Roman law divided partnerships into two divisions, general and special. The first division of general partnerships included those in which the partners placed all their property, time and efforts in a common ownership. This division

[14] In re Ess, Fed. Cas. No. 4530, 3 N. Y. 374; Fosdick v. Van Horn, 40 Biss. (U. S.) 301; North v. Bloss, 30 Ohio St. 459.

[15] See ante § 4.

is by later writers considered under an entirely separate heading, viz., universal partnerships, and will be so discussed here. It is an unusual form of partnership, as comparatively few persons care to enter into such close relations with another, and yet it does exist.[16] In Louisiana universal partnerships are recognized by the code, but, unlike most states, must be registered.[17] The case just cited also holds that the parties must put everything they possess in the partnership to make it universal. However, on account of the disfavor with which universal partnerships are viewed by the people at large, a court will not presume a partnership universal unless it clearly appears so to have been intended by the partners.[18] There is no rule of public policy which is broken by universal partnership.[19] It follows from the rule above given as to contribution in such partnerships that the same rule applies to division of profits, and that all profits, however made, are for the joint benefit of the partners.[20]

§ 143. **General partnerships.**—The second division of general partnership under Roman law is that form where the partners join their effects and services in business or professions, not including certain outside matters. This division in itself is the general partnership of modern writers in common law jurisdictions. This is the class of partnerships which we meet in everyday business life, with which we are most familiar, and that with which the greater portion of this work will be taken up.

§ 144. **Special or particular partnerships.**—The special or particular is the partnership which deals with a single investment or other transaction of a business nature. It is very satisfactorily explained in a United States case,[21] which holds that a

[16] Lyman v. Lyman, Fed. Cas. No. 8628, 2 Paine (U. S.) 11; Gass v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; Waite v. Merrill, 4 Greenl. (Maine) 102, 16 Am. Dec. 238; Gasely v. Separatists Soc., 13 Ohio St. 144; Schriber v. Rapp, 5 Watts (Pa.) 351, 30 Am. Dec. 327.

[17] Murrill v. Murrill, 33 La. Ann. 1233.

[18] Gray v. Palmer, 9 Cal. 616; Mitchell v. O'Neale, 4 Nev. 504.

[19] Gray v. Palmer, 9 Cal. 616.

[20] Bates Partnership, p. 13.

[21] In re Warren, Fed. Cas. No. 17191, 1 Dav. (U. S.) 320.

partnership may exist in a single as well as in a series of transactions, and that if there is a joint purchase with a view to a joint sale and a communion of profit and loss, this will constitute a partnership.[22] Not all associations of persons, however, who join together and subscribe toward a common fund for a purchase of property, can be considered special partnerships, for, owing to the lack of certain essentials of partnership, as, for instance, not being organized for profit, there may be no such relation. An illustration of this principle is when certain persons join in building a church, which is to be owned by the members contributing in proportion to the various amounts contributed by them.[23] In some of the older cases this class of partnerships was referred to as "limited partnerships,"[24] but this term is not used in the modern law in this connection, the term limited now referring to liability, and not to scope.

§ 145. Classification loosely used.—The classification of partnerships into universal, general and special or particular is very generally used by text-book writers and jurists, but the line of demarcation between the classes is differently drawn. Some throw certain partnerships, which are general under the above classification, among universal partnerships, as, for example, where the whole capital is not invested, but the scope of the business is unlimited.[25] Particular partnerships sometimes, under other classifications, take from general partnerships those partnerships which do not necessarily deal with a particular transaction, but with a particular branch of business.[26]

[22] Kayser v. Mongham, 8 Colo. 232, 6 Pac. 803. See also Heshion v. Julian, 82 Ind. 576; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165. See § 168 on partnership in a single transaction.

[23] Woodward v. Cowing, 41 Maine 9, 66 Am. Dec. 211. See also § 124 on joint purchase and § 159 on joint ownership.

[24] American Ins. Co. v. Coster, 3 Paige (N. Y.) 323.

[25] Goldsmith v. Sachs, 17 Fed. 726, 8 Sawy. (U. S.) 110; Princeton &c. Tpk. Co. v. Gulick, 16 N. J. L. 161; Am. & Eng. Encyc. of Law (Universal Pts.).

[26] See cases cited under special partnership, § 144.

It is, however, submitted that the classifications last referred to are not logical, but arbitrary, and that there is no actual dividing line between them, as the line must consequently shift with every close decision. On the contrary, the clear lines of demarcation of the classification herein is mentioned, and summarized as follows: Universal: All property and services. General: All property and services in a certain line or lines, less than all. Special: Single transactions. Perhaps, after all, the classification is not of supreme importance, as the rules governing the partnership liability and the individual liability connected thereto, are largely the same in all these divisions.

§ 146. Limited partnerships.—Limited partnerships, although coming properly within this classification, will be considered but briefly here, owing to the fact that the subject has grown, under our modern conditions, to such proportions as to constitute almost a branch of the law in itself, and to require an entire chapter for an intelligent discussion. In many states statutory provision is made for the formation of limited partnerships. A limited partnership is one where the firm consists of one or more general partners and one or several special partners, the latter being liable for the debts or losses of the firm only to the amount of their several contributions in cash to the firm capital.[27] Provision is made by such statutes for the method in which the limited partnership must be formed and for the publication of notice of the limited liability of certain members. Should there be a failure to comply with these statutory regulations the resulting partnership will be general, and not limited.[28] In some jurisdictions it is provided or held that substantial compliance with the statutory provision is sufficient.[29] Other cases hold that such statute must be

[27] Black's Law Dictionary, 874; Robbins Electric Co. v. Weber, 172 Pa. St. 635, 34 Atl. 116.

[28] Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; Ussery v. Crusman (Tenn. Ch. App.), 47 S. W. 567. "A limited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law." Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103.

[29] Cummings v. Hayes, 100 Ill. App.

strictly complied with.[30] Thus, where there was an omission of a required publication giving notice of the formation of such limited partnership[31] or where the affidavit which stated that the special partner's contribution to the firm capital has been actually paid in was false,[32] it has been held that there was a general partnership. A limited partnership may also become general when upon renewal the assets of the firm are substantially less than they were at the time of its formation.[33] A limited partnership also becomes general if it continues in business after the time for which it was created has expired.[34] The statutory provision for the renewal and continuance of a limited partnership must be complied with.[35]

§ 147. Joint stock companies.—A joint stock company is an association of persons combining property or services in a

347; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Spencer Optical Mfg. Co. v. Johnson, 53 S. Car. 533, 31 S. E. 392; Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799. See also Buckle v. Iler, 40 Misc. (N. Y.) 214, 81 N. Y. S. 631; Patterson v. Youngs, 129 N. Y. S. 673.

[30] Holliday v. Union Bag &c. Co., 3 Colo. 342; In re Thayer, Fed. Cas. No. 13867, 7 Am. L. Rev. 177; Pierce v. Bryant, 5 Allen (Mass.) 91; Haggerty v. Foster, 103 Mass. 17; Matter of Allen, 41 Minn. 430, 43 N. W. 382.

[31] Davis v. Sanderlin, 119 N. Car. 84, 25 S. E. 815.

[32] Myers v. Edison General Electric Co., 59 N. J. L. 153, 35 Atl. 1069. In the above case the certificate stated that the special partner had paid in his contribution, when it was not paid in fact till about a week later. Held this rendered the special partner liable generally. To same effect, Patterson v. Youngs, 129 N. Y. S. 673. See in this connection Chick v. Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833. In the above case the affidavit was filed stating that the amount of the special partner's contribution to the capital stock had been paid in. The special partner's check for the amount had actually been received, but was not presented until after the affidavit was made. It was held that the receipt of the check justified the affidavit. For other cases in which it was held that there had not been a sufficient compliance with the statute see Spencer Optical Mfg. Co. v. Johnson, 53 S. Car. 533, 31 S. E. 392; Blumenthal v. Whitaker, 170 Pa. St. 309, 33 Atl. 103; First Nat. Bank v. Creveling, 177 Pa. St. 270, 35 Atl. 595.

[33] Durgin v. Colburn, 176 Mass. 110, 57 N. E. 213. See also Lee v. Burnley, 195 Pa. St. 58, 45 Atl. 668; Fourth Street Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100.

[34] Sarmiento v. The Catharine C., 110 Mich. 120, 67 N. W. 1085; Columbia Bank v. Berolzheimer, 33 App. Div. (N. Y.) 235, 53 N. Y. S. 417.

[35] Strang v. Thomas, 114 Wis. 599, 91 N. W. 237.

common business for profit, but which, by complying with certain prescribed rules, may release its members from certain liabilities imposed upon ordinary partnerships. It partakes of the nature of a corporation, in that there is no delectus personarum as to members, and that neither the death of a member nor the transfer of his shares to another works a dissolution of the business.[86]

As Mr. Bates, in his work on Partnership says: "The fact of transferable shares makes such an association different, not merely in magnitude, but in kind, from ordinary partnerships, because not based upon mutual trust and confidence in the skill, knowledge, and integrity of every other partner. Hence a sale of his shares by a member, the shares being transferable, is not a dissolution. Death of a member is not a dissolution, if such was the intent, and the character of the association, in that the shares are transferable and it is governed by officers, and is in the form of a corporation, is evidence of such intent. It is sometimes thought that in a joint stock company there is no individual liability of shareholders, except as to the money actually paid in or subscribed. This, however, is not inherently correct, and is only made so by statute, this rule being recognized by the writers." Judge Story, in his work says: "In joint stock and other large companies which are not incorporated, but are a simple, though extensive, partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate commercial partnership." Along the same line Mr. Bates says: "There is no intermediate association, or form of organization, between a corporation and a partnership, known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint stock company is treated and has the attributes of a common partnership."[87] It is however true, with joint stock companies (as in other partnerships), that an agreement

[86] Machinists' Nat. Bank v. Dean, 124 Mass. 81; Carter v. McClure, 98 Tenn. 109 (1897), 38 S. W. 585, 36 L. R. A. 282, 60 Am. St. 842; McNeish v. Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Moore v. May, 117 Wis. 192 (1903), 94 N. W. 45.

[87] Bates Partnership, p. 72.

made between the parties limiting liability, which agreement is known and assented to by the creditor, is valid as to the creditor.[38] Joint stock companies are also like corporations in that there is not general and mutual agency, but that the business is conducted through certain officers or agents who have all the power to bind the company that partners have to bind the firm.[39] There is a distinction between the common-law joint stock company,—which is in effect a partnership, though using a corporate name, and managed by selected members, as the shareholders are liable for the debts of the company as in an ordinary partnership[40]—and the statutory joint stock company, which is organized under special statute, is practically a quasi-corporation, and is different from a corporation only in the fact that its members are liable as partners.[41] A later chapter will be devoted to a fuller consideration of joint stock companies.

§ 148. Partnership associations.—In some jurisdictions, among them Pennsylvania and Michigan, provision is made by statute for certain organizations known as partnership associations.[42] These associations may be formed for any purpose which is carried on by an ordinary business corporation, and they are organized in much the same manner. They usually issue stock, adopt a seal, and can, in the state of their origin, sue and be sued in the association name. The word "limited" is appended to this name. In Pennsylvania, the transferee of stock can not take part in the management of the association until he is elected by the other members.[43] The Pennsylvania courts hold that such an association is sui generis, is not a joint stock company, is a quasi-corporation, but while similar in some respects to a corpora-

[38] Walburn v. Ingilby, 1 Myl. & K. 61 (1833), 3 L. J. Ch. 385.

[39] Van Aernam v. Bleustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470.

[40] Hodgson v. Baldwin, 65 Ill. 532; Frost v. Walker, 60 Maine 468; Taft v. Warde, 106 Mass. 518; Kramer v. Arthurs, 7 Pa. St. 165.

[41] People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

[42] Act of June 2, 1874, Pa. Laws, p. 271; 2 Comp. Stat. of Mich., ch. 160.

[43] Laflin v. Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690.

tion, is in its essentials a partnership.[44] The Massachusetts courts hold them to be merely joint stock companies and treat them as partnerships.[45] In Michigan they are considered corporations and not limited partnerships.[46] The United States Supreme Court holds that they are not corporations so far as federal jurisdiction is concerned.[47] The status of such associations, outside of the state of their origin, is uncertain.

§ 149. Subpartnerships.—A subpartnership can perhaps be defined in no more concise and satisfactory manner than by borrowing Mr. Lindley's statement that it is a "partnership within a partnership." One or more of the partners in any partnership may enter into another partnership among themselves or with third persons, for the further disposition of their profits or losses in the main partnership. For example, A, B and C are the members of a partnership. C has an agreement with another party, D, whereby D furnishes money to C, assists him therein, and is to receive one half the profits received by C therefor. This is only a subpartnership, and D is not liable as a partner in the principal firm to A and B, and, for the same reason, can not demand a partnership accounting from the principal firm. He has no ownership in the assets of the principal firm, before distribution, but as soon as C gets his proportion of the profits, D is then an owner with C of C's interest.[48]

That the subpartner can not have recourse against the principal partners of their debtors, by reason of the subpartnership, is evident. A more difficult question is presented as to the liability

[44] Carter v. Producers' Oil Co., 182 Pa. St. 551, 38 Atl. 571, 39 L. R. A. 100; 200 Pa. 579, 50 Atl. 167.

[45] Edwards v. Warren Linoline &c. Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791.

[46] Staver &c. Co. v. Blake, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798; Rouse &c. Co. v. Detroit Cycle Co., 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794.

[47] Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 482. See, contra, an earlier circuit court case, Andrews Bros. Co. v. Youngstown Coke Co., Ltd., 86 Fed. 585, 30 C. C. A. 293.

[48] Ex parte Barrow, 2 Rose 252; Bray v. Fromont, 6 Madd. 5, 22 R. R. 224; Ex parte Dodgson, Mont. & Mac. A. 445.

of the subpartner to the creditors of the principal firm. Like any other person, he may, of course, be liable under certain conditions, and this liability will be, therefore, excluded from this discussion, as the question arises at this place simply as to the liability arising from the fact alone of subpartnership, with its sharing of profits, or profits and losses. We may also eliminate a discussion of the English law, as there is no liability there, since the case of Cox v. Hickman abrogated the sharing of profits as a test of partnership. This leaves the American law to be considered and in this country the law is not uniform. In many jurisdictions which follow the case of Cox v. Hickman, as a general rule the subpartner's liability is denied, as his sharing of profits does not of itself establish the liability. Even in some jurisdictions which do not recognize the authority of Cox v. Hickman, but hold the test to be sharing of profits, subject to the exception that the profits must be profits as such, a subpartner is considered not to be a partner with the principal partners to creditors, as the subpartner does not share profits as such, but only has an interest in them as a fixed fund, after they are distributed to the partner with whom he is interested as a subpartner. The rule in force in New York, for example, illustrates this principle,[49] while in Massachusetts several leading cases[50] hold the contrary doctrine, that the participation of the subpartner in the profits as such, renders him liable to the creditors of the principal firm. The above decisions in the states named are typical of the viewpoint from which the subject is seen in the various jurisdictions, and the general trend of any jurisdiction as to the test of partnership must be investigated in order to judge its attitude upon the liability of subpartners to creditors of the principal firm. The above New York case of Burnett v. Snyder further decides, however, that one who becomes a joint owner with a partner of his share in a partnership, standing in his name alone, with the knowledge and

[49] Nirdlinger v. Bernheimer, 133 N. Y. 45 (1892), 30 N. E. 561; Burnett v. Snyder, 81 N. Y. 550 (1880), 37 Am. Rep. 527; Burnett v. Snyder, 76 N. Y. 344; Burnett v. Snyder, 45 N. Y. Super. Ct. 577; Burnett v. Snyder, 43 N. Y. Super. Ct. 238.

[50] Fitch v. Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; Bailey v. Clark, 6 Pick. (Mass.) 372.

consent of all the members of the firm, is liable as a partner. But this relation is more of a real partnership in the principal firm than a subpartnership, as it was an interest in the main firm itself, and was with the consent of the partners of the principal firm themselves, which is necessary in a partnership, but not in a subpartnership.[51] Some courts go a step further, and hold that the mere knowledge and consent of the other main partnership members does not make the subpartner a partner with them unless there was a new partnership among all to that effect.[52] The general rule in this country is undoubtedly in accordance with the rule in England and in New York, and is, it is submitted, the better and more logical of the two, although, it must be conceded, the Massachusetts rule is the only one which gives any meaning to the term "subpartnership," as it is the only rule which makes it a partnership with the principal firm at all.[53]

§ 150. Rights and liabilities of subpartners inter sese.— The principles above set forth only relate to the relations existing between the partnership and the subpartnership, and should not be confused with the principles applying to the members of the subpartnerships as between themselves. As between these members themselves, the subpartnership is an ordinary partnership, of whatever class their agreement or the law makes it, and is governed by all the laws usually governing such ordinary partnerships. There is some question as to whether the subpartnership is, in fact, a real partnership, as it is sometimes said that, "the contract of so-called 'subpartnership' does not provide for a busi-

[51] Along the same line, see Arquimbo v. Hillier, 49 N. Y. Super. Ct. 253. Contra: Fitch v. Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; Rockafellow v. Miller, 107 N. Y. 507, 14 N. E. 433, 12 N. Y. St. 295.

[52] Sheare v. Paine, 12 Allen (Mass.) 289; Channel v. Fassit, 16 Ohio 166.

[53] Bybee v. Hawkett, 12 Fed. 649 (1882), 8 Sawy. (U. S.) 176; Morrison v. Dickey, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; Meyer v. Krohn, 114 Ill. 574 (1885), 2 N. E. 495; Reynolds v. Hicks, 19 Ind. 113 (1862); Boimare v. St. Geme, 113 La. 898, 37 So. 869; Setzer v. Beale, 19 W. Va. 274; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336.

ness to be carried on by the contracting parties in common, with a view to profit."[54]

This objection is, however, based upon the false premise that such an association is not a business to be carried on by the contracting parties in common, with a view of profit. It is conceded that the above might be the case, but not necessarily so. The attending to the dividing and subdividing of profits, which might devolve upon the subpartnership, could become so complicated in itself that it might be looked upon as a separate business. The contracting parties might carry it on for their joint benefit, in common, and there would be a view of profits, although there might be, in some jurisdictions, a dispute as to whether or not the profits were profits as such. The great weight of authority is, moreover, in favor of the proposition that the subpartners are partners, as between themselves.[55]

We have seen above that many jurisdictions hold that there is no partnership between the main partners and the person who is a subpartner only, as the profits are not shared as such. This reasoning does not necessarily apply to the subpartners in the affairs of the subpartnership, as it is readily seen that it has the essentials of a real partnership, loss even being possible if there are expenses, and small profit from the larger partnership.

§ 151. Trading and nontrading partnerships.—The distinction between trading and nontrading partnerships is fully indicated, in a general way, by the names alone. The former is commercial, the object of which is buying and selling. The latter embraces those partnerships which are not embraced under the former. To this extent, the distinction is simple, may be seen at a glance, but when applied to individual cases it is often exceedingly hard to classify the relation. As a rule, the question is immaterial as to which class the partnership belongs; but one exception often makes it very important, this exception being, that in

[54] Burdick on Partnership, p. 67.

[55] Mathewson v. Clarke, 6 How. (U. S.) 122, 12 L. ed. 370; Fitch v. Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; Ex parte Dodgson, Mont. & McA. 445; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Channel v. Fassitt, 16 Ohio 166.

a trading partnership there is a presumption of mutual and general agency, while the rule does not apply in nontrading partnerships. Among trading partnerships might be enumerated those conducting the following businesses: Dry goods stores, general stores,[56] buying and selling cattle and selling meat and vegetables,[57] sugar refinery,[58] farming and cooperage,[59] and pork packing.[60] In Pennsylvania, however, it has been held that there is no distinction between mechanical, manufacturing and commercial partnerships, as the necessity for borrowing might be as great in the former as in the latter.[61] The following partnerships, among others, have been held to be nontrading ones: Attorneys,[62] real estate, insurance and collecting,[63] mining and quarrying,[64] farming or planting,[65] a mere firm of brokers,[66] running a theater.[67] The rule as to the question of agency is very clearly laid down in the illustration last given, of persons running a theater. Loomis, J., there says, in his opinion: "In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business; and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But when we pass to nontrading partnerships the doctrine of general agency does not apply, and there is no

[56] Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75; Dow v. Moore, 47 N. H. 419.

[57] Wagner v. Simmons, 61 Ala. 143.

[58] Twibill v. Perkins, 8 La. Ann. 132.

[59] McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

[60] Benninger v. Hess, 41 Ohio St. 64.

[61] Hoskinson v. Eliot, 62 Pa. St. 393.

[62] Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89; Breckinridge v. Shrieve, 4 Dana (Ky.) 375; Marsh v. Gold, 2 Pick. (Mass.) 285; Hedley v. Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 6 Jur. 853.

[63] Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95.

[64] Decker v. Howell, 42 Cal. 636; Skillman v. Lachman, 23 Cal. 198.

[65] McCrary v. Slaughter, 58 Ala. 230.

[66] Third Nat. Bank v. Snyder, 10 Mo. App. 211.

[67] Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by the partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it." This rule, we take it is the rule adopted by American courts, and is but a reaffirmation of, and in accordance with the English rule. Lord Denman, in a well-known English case,[68] said that: "Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is the usual course of mercantile transactions so to do; and the authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom that attorneys should be parties to negotiable instruments, nor is it necessary for the purpose of their business. Upon the whole, we think that the implied authority is confined to partners in trade." Some authorities ignore the test of liability referred to, but adopt another, which is equivalent in result. Chancellor Kent, in his chapter on partnership in the third volume of his Commentaries,[69] omits the use of the terms "trading" and "nontrading" and makes the distinction between partnerships, in respect to the power of one partner to bind the firm, depend on the single test of the usual scope of the business, in connection with the subject-matter of the contract. This rule was adopted in Crosthwait v. Ross,[70] where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which to raise money, because it was not within the scope of the partnership business. Though under a different name, the real distinction here taken is between partners in trade and partners in an occupation.[71] As above treated, it really makes no difference whether the question hinges

[68] Hedley v. Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 6 Jur. 853.

[69] 7th ed., p. 44.

[70] 1 Humph. (Tenn.) 23, 34 Am. Dec. 613.

[71] Pease v. Cole, 53 Conn. 53 (1885), 22 Atl. 681, 55 Am. Rep. 53.

upon the terms "trading partnership" or upon "scope of authority" as the first term implies the second, in the absence of stipulations to the contrary.

§ 152. **Mining partnerships.**—A mining partnership permits the co-owners of a mine to be partners only in the profits, the mine being owned as tenants in common, and not as partnership property.[72] The general rules of partnership apply, except where modified by the fact that the common property is held as tenants in common. For instance, as in other cases of partnership, there must be some community of profit and loss.[73] The ownership of the mine as co-tenants, however, allows one party to sell his share to a third person without the consent of his co-owners and without dissolving the partnership, since the profits follow the property.[74]

Since this method of transfer of interests does away with the delectus personæ, there is no relation of trust and confidence and one partner can not bind the other by his act or contract. Even a partner who has been placed in charge as manager can only bind the others by contracts for necessary labor or supplies, and can not give a note unless expressly authorized, or permitted by usage

[72] Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. ed. 764; Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. ed 126; Kahn v. Central Smelting Co., 102 U. S. 641, 26 L. ed. 266; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Harris v. Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. 475; Daily v. Fitzgerald, 17 N. Mex. 137, 125 Pac. 625, Ann. Cas. 1914 D, 1183n; Lindley Partnership, p. 55.

[73] Barber v. Cazalis, 30 Cal. 92.

[74] Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510; Thomas v. Hurst, 73 Fed. 372; Nisbet v. Nash, 52 Cal. 540; Duryea v. Burt, 28 Cal. 569; Hawkins v. Spokane Hydraulic Min. Co., 3 Idaho 241, 28 Pac. 433; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. 318; Lamar v. Hale, 79 Va. 147; Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254, 4 Ann. Cas. 265 and note; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

to do so.[75] In one case it was said:[76] "It would be most unjust to subject each proprietor to personal liabilities, which might sweep away all his property, created against his consent by those who became members against his wishes." It was said in one case with regard to the exceptions to the rules of ordinary partnership as applied to mining partnerships: "Among the exceptions is one which allows one member of a mining partnership to convey his interest in the mine and business to a stranger without dissolving the copartnership. This exception has grown out of the necessities of the case, which require the continuous working of mines in order that the same may be made profitable. So, likewise, it has been held that neither assignment, nor death, nor bankruptcy of the owner of an interest in a mining concern should operate to dissolve a copartnership existing for the purpose of working the mine. Another difference between a mining partnership and an ordinary trading partnership is that the former is not founded upon the delectus personæ, while the latter is. Hence, one mining partner has not the right to bind his associates to the same extent as a member of a trading partnership."[77] It has been said that a mining partnership is a cross between tenancy in common and partnership proper.[78] It is also true that mining partnerships are similar to joint stock companies, to the extent that there is no delectus personæ, as above explained. It may be wondered why mining partnerships are to be looked upon as any different from partnerships in any other occupation, but it must be remembered that law is unsettled, as a rule, in mining

[75] Kahn v. Central Smelting Co., 102 U. S. 641, 26 L. ed. 266; Taylor v. Castle, 42 Cal. 367; Jones v. Clark, 42 Cal. 180; Settembre v. Putnam, 30 Cal. 490; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Charles v. Eshleman, 5 Colo. 107; Shaw v. McGregory, 105 Mass. 96; Bentley v. Brossard, 33 Utah 396, 94 Pac. 736; Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. 1005; Fereday v. Wightwick, 1 Russ. & M. 45, 31 R. R. 93; Tredwen v. Bourne, 6 M. & W. 461, 9 L. J., Ex. 220, 4 Jur. 747.

[76] Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96.

[77] Patrick v. Weston, 22 Colo. 45, 43 Pac. 446 (1895). See also Charles v. Eschleman, 5 Colo. 114; Manville v. Parks, 7 Colo. 128, 2 Pac. 212.

[78] Gilmore Partnership, p. 107. Mallett v. Uncle Sam Gold &c. Min. Co., 1 Nev. 188, 90 Am. Dec. 484. See also Nolan v. Lovelock, 1 Mont. 224.

camps, and that habits of miners, and their continuous change from one locality to another, together with the nature of the work, combine to produce a rule more conformable to mining conditions. Of course, the above only applies to the legal presumption, and there is nothing to prevent the partners from adopting all the principles of an ordinary partnership, should they so provide.[79] The majority in interest in a mining partnership have the right to control the method and means of working the mine.[80]

§ 153. Creation and dissolution of mining partnerships.— A mining partnership arises by operation of law, where co-owners work a mine.[81] It may be created by agreement.[82] There may be a mining partnership merely in working a claim, which is

[79] Bybee v. Hawkett, 12 Fed. 649, 8 Sawy. (U. S.) 176; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264; Decker v. Howell, 42 Cal. 636; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; Haskins v. Curran, 4 Idaho 573, 43 Pac. 559; State Nat. Bank v. Butler, 149 Ill. 575, 36 N. E. 1000; Doyle v. Burns, 123 Iowa 488, 99 N. W. 195; Freeman v. Hemenway, 75 Mo. App. 611; Congdon v. Olds, 18 Mont. 487; Horton v. New Pass Gold &c. Min. Co., 21 Nev. 184, 27 Pac. 376, 1018; Randall v. Merideth, 76 Tex. 669, 13 S. W. 576; Sauntry v. Dunlap, 12 Wis. 364; Crawshay v. Maule, 1 Swanst. 495, 1 Wils. 181.

[80] Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Hawkins v. Spokane Hydraulic Min. Co., 3 Idaho 241, 28 Pac. 433; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

[81] Howard v. Luce, 171 Fed. 584; Walker v. Bruce, 44 Colo. 109, 97 Pac. 250; Manville v. Parks, 7 Colo. 128, 2 Pac. 212; Dale v. Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929; Freeman v. Hemenway, 75 Mo. App. 611; Daily v. Fitzgerald, 17 N. Mex. 137, 125 Pac. 625, Ann. Cas. 1914 D, 1183n; Bentley v. Brossard, 33 Utah 396, 94 Pac. 736; Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. 1005; Marks v. Gates, 2 Alaska 519.

In California and Idaho it is provided by statute that "a mining partnership exists when two or more persons own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557; Duryea v. Burt, 28 Cal. 569; Hawkins v. Spokane Hydraulic Min. Co., 3 Idaho 241, 28 Pac. 433.

[82] Ervin v. Masterman, 16 Ohio C. C. 62, 8 Ohio C. D. 516; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

owned by one of the partners, and in the profits, though none in the title.[83]

Co-ownership of a mining claim does not in itself constitute a mining partnership; it is a partnership only when the co-owners work the mine.[84] Where one merely enters into a "grub-stake" contract, by which he is to furnish supplies to a prospector and share in mining claims which he may discover, no partnership is created.[85] When one mining partner dies, the survivors have no right of control of his interest—this right failing since there is no delectus personæ.[86] Whether a mining partner is liable for debts incurred by the partnership subsequent to the sale of his interest, depends on the facts of the case, and rests practically on the law of estoppel, and he may be liable to employés and creditors who do not know of the transfer.[87] The permanent suspension of the operation of a mine dissolves the mining partnership.[88] The estate of a mining partner succeeds to the interest of a deceased partner occupying the same relation he would if alive.[89] The ceasing of work by one mining partner dissolves the partnership as to him.[90]

§ 154. Legal and illegal partnerships.—The term "illegal partnership" is often loosely used, but it is, technically, an improper use of the term, as all real partnerships must be formed for a legal object. The relation thus formed for illegal purposes can not be a partnership, but simply an attempt to form a partnership, and which may or may not carry partnership liability, according to the circumstances of each individual case. With this explanation, the term will hereafter be used, simply as a matter of convenience in referring to the subject, and without regard to its technical inaccuracy. The illegality of the firm,

[83] McMahon v. Meehan, 2 Alaska 278.

[84] Madar v. Norman, 13 Idaho 585, 92 Pac. 572.

[85] Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.

[86] Jones v. Clark, 42 Cal. 180.

[87] Kelley v. McNamee, 164 Fed. 369, 90 C. C. A. 357, 16 Ann. Cas. 303.

[88] Nielson v. Gross, 17 Cal. App. 74, 118 Pac. 725.

[89] Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413.

[90] Lamont v. Reynolds (Colo. App.), 144 Pac. 1131.

however, may not affect the rights of third parties who are not parties thereto, it having been held that when a clergyman is prohibited by law from trading, and he becomes a secret partner in a trading firm, he is liable to become a bankrupt in respect to the partnership concerns.[91] It is also generally true that, on the other hand, the creditor can not take any advantage of the fact that the partnership is illegal and that the fact of the illegality of the partnership will not give the creditor any rights in the partnership property which he would not have had were the partnership legal.[92] The illegality will not, however, be presumed from minor and nonessential matters, but must be shown plainly to have arisen from an essential element of the partnership.[93]

The policy of the law, in illegal partnerships, is the same as the usual one in all illegal contracts, namely, to leave the parties in the same position as it finds them, and to lend no aid to carry out such an illegal agreement, and it will not aid in an accounting. It is immaterial whether the partnership is illegal, or whether the partnership is itself legally organized, but has some illegal profits or losses to be adjusted.[94] Liability arising from attempts to form partnerships having an illegal purpose will be further discussed in the chapter on "Purposes and Subject-matter;"[95] and in the chapter on "Who May Be Partners," the subject of attempted partnerships between persons forbidden by law to form such relations, will be considered.[96]

§ 155. Defective incorporations.—There is a great diversity of opinion as to whether or not persons attempting to form a corporation, which proves defective, and is not perfected, become liable to creditors of the concern as partners. Those jurisdictions which hold to the partnership liability do so upon the theory that, the incorporation failing, it leaves the members thereof standing simply as individuals joined together in a common business for the sake of profit, and, ig-

[91] Meymots Case, 1 Atk. 198.
[92] Tucker v. Adams, 63 N. H. 361.
[93] Whitcher v. Morey, 39 Vt. 459.
[94] Snell v. Dwight, 120 Mass. 9; Fairbank v. Leary, 40 Wis. 637.
[95] See ch. 6.
[96] See ch. 7.

noring the test of intention of the parties look upon them as having assumed partnership relations. The implication would arise that each subscriber would be liable to creditors for the whole indebtedness, but that he would also be entitled to a contribution from the other subscribers. This right of contribution was denied in a Kentucky case,[97] but the court, in its opinion, recognized the general rule, deciding the case "entirely upon the sufficiency of appellant's petition to sustain the action against appellees." Several citations are given in the notes below which hold that the subscribers in defectively organized corporations are liable as partners.[98] In one New York case[99] it was even held that neither the intention of the subscribers nor the belief of the creditors in the transaction governed the relation, but that the mere fact that the corporation was not legally organized created the partnership liability. Other, and probably more numerous and authoritative, decisions hold a different rule, not holding the subscribers liable as partners if they believed that they were incorporated, and assuming only a stockholder's liability. This holding is more in conformity with the test of intention, and is supported by many strong decisions.[1] If, however, a creditor obtains a judgment against a corporation as such, he is estopped from claiming that the stockholders are partners.[2] Perhaps the clearest conception of the true rule is given by Mr. Justice Garver, in a Kansas case,[3] from which decision, owing to its clear statement, we quote at some length: "When the question (of corporate existence) arises collaterally, as it does in this case, it is not nec-

[97] Warring v. Arthur, 98 Ky. 34, 32 S. W. 221 (1896), 17 Ky. L. 605.

[98] Garnett v. Richardson, 35 Ark. 144; Flagg v. Stone, 85 Ill. 164; Coleman v. Coleman, 78 Ind. 344; Vredenburg v. Behan, 33 La. Ann. 627; Martin v. Fewell, 79 Mo. 401.

[99] Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643.

[1] Gartside Coal Co. v. Maxwell, 22 Fed. 197; Tarbell v. Page, 24 Ill. 46; Ward v. Brigham, 127 Mass. 24; New York Iron Mine v. First Nat. Bank, 39 Mich. 644; Merchants' Nat. Bank v. Pendleton, 55 Hun (N. Y.) 579, 9 N. Y. S. 46, 29 N. Y. St. 891; Rowland v. Meader Fur Co., 38 Ohio St. 269.

[2] Cresswell v. Oberly, 17 Ill. App. 281; Pocheln v. Kemper, 14 La. Ann. 308, 74 Am. Dec. 433.

[3] McLennan v. Hopkins, 2 Kans. App. 260, 41 Pac. 1061 (1895).

essary that the various steps prescribed by law should have been fully and regularly taken, or that the corporation should exist de jure; it is sufficient that enough has been done to make it a corporation de facto. * * * It is difficult, and perhaps unnecessary, to attempt to reconcile the many decisions bearing on this question. Between some of them there is an irreconcilable conflict, so that when we come to determine what is a de facto corporation, we are met by a diversity of authority." The rule recognized by the Supreme Court of this state is thus stated by Mr. Justice Brewer:[4] "When parties have associated themselves together for the purpose of organizing a corporation under a general law, and have proceeded in good faith to take all the steps supposed necessary to complete such incorporation, and on the faith thereof engage in business as a corporation for a series of years, a party who has repeatedly dealt with them as such will not, when sued on a note and mortgage held by it, be permitted to show, as a defense to the action, that there was some technical omission in the steps prescribed for incorporation. The corporation is one de facto; and only the state can then inquire—and that in a direct proceeding—whether it be one de jure. * * * There must in such cases be a law under which the incorporation can be had. There must also be an attempt in good faith on the part of the incorporators to incorporate under such law. And when, after this, there has been for a series of years an actual, open and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuses after the incorporation, are subjects of inquiry in such an action. The attempt to incorporate, referred to in that case, must be something more than the mere physical organization, or formal arrangement into a working force, of the promoters of the enter-

[4] Pape v. Capitol Bank, 20 Kans. 440, 27 Am. Rep. 183.

prise. Something must be done beyond the mere transaction of business in the manner and form usually adopted by corporations. There must also be something more tangible and effective than a mere mental operation in the direction of what is intended. The steps taken and the attempt made must, to some extent and in some degree, have resulted in the effecting of those things which the law designates as a prerequisite to a corporate existence, however informal and irregular such proceedings and results may be." Some cases[5] hold that when there is a failure on the part of the organizers of the claimed corporation to do some act, generally the neglect to file the articles of association or incorporation, made by the statute a prerequisite to corporate existence, there is no de facto corporation, and that the claimed corporate existence may be attacked collaterally. If, however, a person is sued by the alleged corporation upon a contract in which the corporate capacity is recognized, an exception to the foregoing rule exists,[6] as the question, in this connection, hinges upon the rule which forbids a party to avoid his contracts simply because the person with whom he contracts has not the legal capacity to enter into a contract of which he has had the benefit. The whole question is, as has been indicated above, not uniform in the various jurisdictions, and has, in many, been made the subject of statutory regulation, and should, consequently, be carefully investigated in every jurisdiction. It will be more fully treated in a subsequent chapter.[7]

§ 156. Unincorporated associations.—It will be remembered that, in order for an association of individuals to become

[5] Bigelow v. Gregory, 73 Ill. 197; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 14 Am. Rep. 85; Whipple v. Parker, 29 Mich. 369; Granby Min. &c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Hurt v. Salisbury, 55 Mo. 310; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Hill v. Beach, 12 N. J. Eq. 31; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397.

[6] Fresno Canal &c. Co. v. Warner, 72 Cal. 379, 14 Pac. 37; Meikel v. German Sav. Fund Soc., 16 Ind. 181; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Massey v. Citizens' Building &c. Assn., 22 Kans. 624.

[7] See ch. 9.

liable as partners, by reason of the association alone, there must be a view of profit. Consequently, if there be no profit in contemplation, there is no partnership or partnership liability. Co-ownership is not partnership, in itself, and if two or more persons purchase property with the intention of dividing it, or of erecting a building, this, of itself, does not constitute a partnership.[8]

§ 157. **Clubs and societies.**—An interesting and important question arises here as to the liability of individual members of a club—social, political or otherwise, but not for profit. The rule is that the members are not liable as partners by reason of the membership,[9] but simply through their individual and personal participation in the act from which the liability originated. The officers who may make the contracts are liable, and all others who authorize or ratify, or assist in the making of the contract are liable thereon.[10] Partnership agency is not implied from such association alone, but must be proved, though a course of dealing may amount to proof of original authority.[11] In many ways the association, while not a partnership, is nevertheless, in some respects, similar thereto. For instance, part of the members can not sue the others on the contract of the association;[12] but a court of equity may entertain a bill to wind up such an organization.[13] Perhaps the general rule as to the liability of members of unincorporated associations is, that the membership itself does not alone establish the liability upon the member, but that the participation in, or authorization or ratification of the act by the member must be the cause of his liability.

§ 158. **Partnership by representation.**—The question often arises as to whether or not persons, acting as personal repre-

[8] Porter v. McClure, 15 Wend. (N. Y.) 187; Morris v. Litchfield, 14 Ill. App. 83. See §§ 159, 169.

[9] Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; Richmond v. Judy, 6 Mo. App. 465.

[10] Ray v. Powers, 134 Mass. 22; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540.

[11] Richmond v. Judy, 6 Mo. App. 465.

[12] McMahon v. Rauhr, 47 N. Y. 67.

[13] Gorman v. Russell, 14 Cal. 531.

sentatives, such as administrators or executors, become partners with those who were in partnership with the persons for whom the representatives act. The executors and devisees of a deceased partner have no right to insist on admission into partnership with the surviving partners, unless those partners have previously entered into an agreement to that effect,[14] neither the authority to continue the business.[15]

The executors' right as against the surviving partners is to have the deceased partner's share ascertained and paid,[16] and they may enforce this right by bringing an action which may ruin the partnership business. On the other hand, if executors allow the share of the deceased to remain in the business and take the profits for the estate, the executors or administrators may become personally liable to creditors as partners for debts contracted in carrying on the business.[17] Administration of the estate's interest as a going partnership under order of court may protect the representatives personally.[18] Even if the testator directs the executor by will to continue the business and the articles of partnership permit this, the executor is personally liable for debts contracted in a partnership business, where he engages in the business and uses the testator's assets though for the benefit of the estate,[19] but if in conformance with a testamentary direction or with the partnership articles, he merely allows the partner's capital to remain till the end of the partnership term, he is not personally liable, unless he personally engages in the business.[20] The liability seems to depend on whether the executor

[14] Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; McCann v. Hazard, 36 Misc. 7, 72 N. Y. S. 45; Pearce v. Chamberlain, 2 Ves. Sr. 33; Crawford v. Hamilton, 3 Madd. 254; Crawshay v. Maule, 1 Swanst. 495, 1 Wils. 181.

[15] Altgelt v. Alamo Bank, 98 Tex. 252, 83 S. W. 6.

[16] Lindley Partnership (8th ed.), p. 695.

[17] Michels Co. v. Young, 150 Ill. App. 442; In re Maloney's Estate, 233 Pa. 614, 82 Atl. 958; Ex parte Holdsworth, 1 Mont. D. & D. 475; Ex parte Garland, 10 Ves. 110, 7 R. R. 352; Holme v. Hammond, 14 L. J., Ex. 157, L. R. 7 Ex. 218.

[18] Waller v. Barrett, 24 Beav. 413, 27 L. J. Ch. 214, 4 Jur. (N. S.) 128.

[19] Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

[20] Richter v. Poppenhusen, 9 Abb. (N. S.) 263, 57 Barb. 309, 39 How. Pr. 82 (affd. 42 N. Y. 373); Wild v. Davenport, 48 N. J. L. 29, 7 Atl. 295. 57 Am. Rep. 552.

merely leaves capital in the business, or himself actually takes part. In the latter case only he is personally liable, and is not liable in a representative capacity.[21] If he takes no active part, but merely allows the capital to remain, he is not personally liable.[22] In the case of Richter v. Poppenhusen,[23] it was said that to render the executors of a deceased partner liable as partners, with the surviving partner, in respect to the business carried on after the death of their testator: "It is necessary to show that they voluntarily employed the testator's assets which had come to them, in the trade. It is not sufficient that the business is carried on by the surviving partner, with their assent and encouragement; for it was his right and duty to do so, without either. * * * Nor do the executors incur any responsibility by allowing the share of the capital of the testator to remain in, and be employed in the business of the partnership, after his death, for the benefit of the cestui que trust, when it is done in accordance with the testator's instructions contained in his will, or with the partnership agreement; but the assets so directed to be employed are liable to make good the debts contracted during their employment. To this extent the estate of a deceased partner will, in equity, be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. The executors, however, can not be made liable personally, without entering into the partnership. When this is done, then they become liable as partners, although they derive no profit personally, but are concerned only for the use and benefit of others; and this liability arises either by virtue of an actual agreement, or upon the familiar principle that they have held themselves out to the world as partners."

[21] Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Richter v. Poppenhusen, 9 Abb. (N. S.) 263, 57 Barb. 309, 39 How. Pr. 82 (affd. 42 N. Y. 373).

[22] Tisch v. Rockafellow, 209 Pa. 419, 58 Atl. 805; Egan v. Wirth, 26 R. I. 363, 58 Atl. 987. See cases cited in four last preceding notes.

[23] 9 Abb. (N. S.) 263, 57 Barb. (N. Y.) 309, 39 How. Pr. 82 (affd. 42 N. Y. 373).

§ 159. **Joint ownership as partnership.**—Joint ownership is not partnership, as a perusal of the decisions will show.[24] Land may be purchased by two or more persons, with the intention of dividing it, or making separate sales.[25] It has even been held that a series of independent transactions wherein one finds money and buys land selected by the other, profits being divided when the lands are sold again, does not make the parties partners.[26] If one party enters into a contract with another, that he will purchase an undivided interest in the second party's land, that they will divide it into lots and sell it, sharing profits and dividing the unsold lots, does not constitute a partnership inter sese.[27] A distinction is seen if the property owned in common was obtained with a view of, and was used for, the purpose of carrying on a business, or if there is to be a community of interest in the profits and losses of the joint property. In such cases, there is a partnership relation.[28]

§ 160. **Joint adventure.**—A joint adventure is a commercial enterprise undertaken by several persons jointly. It is of a nature analogous to partnership and governed, in most respects, by the same rules of law.[29] One distinction from ordinary partnership is that a joint adventure usually relates to a single transaction.[30] The principal distinction is that one party may bring

[24] Dorman v. Gross, 3 Ill. App. 409.

[25] Sikes v. Work, 6 Gray (Mass.) 433; Schaeffer v. Fowler, 111 Pa. St. 451, 2 Atl. 558.

[26] Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575.

[27] Sears v. Munson, 23 Iowa 380.

[28] Boeklen v. Hardenburgh, 37 N. Y. Super. Ct. 110 (affd. 60 N. Y. 8); Belknap v. Wendell, 21 N. H. 175. See § 125 on distinctions between partnership and joint tenancy; also § 169 on partnership for dealing in lands; also § 115 on community of interest and § 124 on joint purchase.

[29] Slater v. Clark, 68 Ill. App. 433; Doane v. Adams, 15 La. Ann. 350; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Ross v. Willett, 76 Hun (N. Y.) 211, 27 N. Y. S. 785, 58 N. Y. St. 694; Berry v. Colborn, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018.

[30] Camp v. United States, 15 Ct. Cl. 469 (affd. 113 U. S. 648, 5 Sup. Ct. 687, 28 L. ed. 1081, 20 Ct. Cl. 531); Pickerell v. Fisk, 11 La. Ann. 277; Alderton v. Williams, 139 Mich. 296, 102 N. W. 753; Knapp v. Honley, 108 Mo. App. 353, 83 S. W. 1005; Felbel v. Kahn, 29 App. Div. 270, 51 N. Y. S. 435.

an action at law for a breach of the contract or a share of profits or losses or to recover a contribution.[31] In some jurisdictions it is said that a corporation may not become a partner, but may take part in a joint adventure.[32] The subject will be treated more fully later.

[31] Hurley v. Walton, 63 Ill. 260; Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. 562; Taylor v. Bradley, 39 N. Y. 129, 1 Abb. Dec. (N. Y.) 363, 100 Am. Dec. 415; Peltier v. Sewall, 12 Wend. (N. Y.) 386; Finlay v. Stewart, 56 Pa. St. 183.

[32] Mestier v. A. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

CHAPTER VI

PURPOSES AND SUBJECT-MATTER

SECTION

165. Purpose must be for gain.
166. Association for purpose other than pecuniary profit.
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§ 165. Purpose must be for gain.—This subject may be considered in two aspects: First, the purposes for which a partnership may be formed in general; and, second, the scope of a particular partnership agreement. These two phases of the subject will be briefly treated in the order named. As is made apparent by the preceding chapters, the fundamental idea of a partnership inter se is that it is formed for the purpose of trade or gain in business, and that each partner has the right of common ownership in the profits, and to participate in a division of them.[1] The

[1] See ante, ch. 3. "A partnership is a creature of the law merchant, and its origin is founded in that law which is the custom of merchants, recognized and enforced by the courts. One essential feature which must be always present to constitute a partnership is that it is formed for business purposes. It is a voluntary association, arising out of contract, for the purpose of carrying on a joint undertaking, with the object of making a profit to be shared among the partners. Every definition of a partnership includes the purpose of business and profit. It is a combination of two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for the common benefit." Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Missouri Bottlers' Assn. v. Fennerty, 81 Mo. App. 525.

Uniform Partnership Act[2] defines partnership as an association of persons to carry on, as co-owners, a business for profit, and nearly all the other definitions emphasize the fact that to constitute a partnership, the purpose of the association must be for gain.[3]

§ 166. Association for purpose other than pecuniary profit.—As a result, associations, the objects of which are social, literary, or merely to further the public good or mental advancement of their members, and not for pecuniary gain, are not usually considered partnerships.[4] Thus, a musical club,[5] a grand army post,[6] an association to enforce excise laws,[7] an association to save property from destruction by fire,[8] a reform club,[9] are not partnerships. The same is true of a social and religious organization, the members of which put their property in common and live together as one family and have everything in common, there being no profit sharing and no business.[10] An agreement whereby several persons keep house together in order to diminish expenses, one to pay certain designated bills and the other to pay all other bills, has been held not to constitute a partnership.[11] Nor does a mere agreement to hold land in common

[2] Uniform Partnership Act, § 6 (1).

[3] See ch. 2, ante.

[4] Lewis v. Tilton, 64 Iowa 220, 19 S. W. 911, 52 Am. Rep. 436; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; McMahon v. Rauhr, 47 N. Y. 67; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. (N. Y.) 344; Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919; Ash v. Guie, 97 Pa. St. 493, 39 Am. Rep. 818 (a masonic lodge); Winona Lumber Co. v. Church, 6 S. Dak. 498, 62 N. W. 107; Wilson v. Henderson, 123 Cal. 258, 55 Pac. 986; Davison v. Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. 40; Wise v. Perpetual Trustee Co. (Eng.), A. C. 139 (1903); Caldicott v. Griffiths, 1 C. L. R. 715, 8 Ex. 898, 23 L. J. Ex. 54. ("The Midland Counties Guardian Society for the Protection of Trade.")

[5] Danbury Cornet Band v. Bean, 54 N. H. 524; Stewart v. Gibson, 7 Cl. & F. 707.

[6] Pain v. Sample, 158 Pa. St. 428, 27 Atl. 1107.

[7] McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204.

[8] Thomas v. Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98.

[9] Flemyng v. Hector, 2 Gale 180, 6 L. J. Ex. 43, 2 M. & W. 172 ("Westminster Reform Club").

[10] Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044 (where it was more in the nature of a tenancy in common).

[11] Austin v. Thomson, 45 N. H. 113.

constitute a partnership.[12] And an association of farmers to construct and operate a telephone line to connect their residences, each bearing his share of costs and expense, is not a partnership under the New York Code, since the organization was not for the purpose of engaging in trade or business, and there were no profits.[13]

§ 167. **Voluntary associations for mutual relief.**—A company of rural residents who erect and maintain a telephone route connecting their residences, each paying expenses and maintaining his own connections, is a voluntary association, not a partnership.[14] A voluntary unincorporated association of manufacturers to look after the affairs of its members as affected by labor unions of their employés, is not a partnership, although it may incidentally accumulate property.[15] Patrons of a voluntary association engaged in cheese making do not become copartners therein.[16] The members of a farmers' union, one of whom, under a contract with the union, managed a store for it, are not partners, and are not liable to contribute for his services and expenditures.[17] On the other hand, voluntary associations for mutual relief in times of sickness or want, by means of funds raised by initiation fees, dues and the like, are often considered as partnerships.[18] It was said in one case that a society for the employment of its funds in purposes of mutual benevolence, among its members and their families, in the absence of charter, is a "voluntary association of individuals, and the members, in

[12] Huckabee v. Nelson, 54 Ala. 12; Gilmore v. Black, 11 Maine 485; Treiber v. Lanahan, 23 Md. 116; Sikes v. Work, 6 Gray (Mass.) 433; Ballou v. Spencer, 4 Cow. (N. Y.) 163; White v. Fitzgerald, 19 Wis. 480.

[13] Branagan v. Buckman, 67 Misc. (N. Y.) 242, 122 N. Y. S. 610 (judgment affd. (1911), 145 App. Div. 950, 130 N. Y. S. 1106). See also Primm v. White, 162 Mo. App. 594, 142 S. W. 802.

[14] Primm v. White, 162 Mo. App. 594, 142 S. W. 802.

[15] A. J. Lindemann v. Advance Stove Works, 170 Ill. App. 423.

[16] Coolidge v. Taylor, 85 Vt. 39, 80 Atl. 1038.

[17] McDonald v. Fleming, 178 Mich. 206, 144 N. W. 519.

[18] Pearce v. Piper, 17 Ves. 1, 11 R. R. 1; Beaumont v. Meredith, 3 Ves. & B. 180; Gorman v. Russell, 14 Cal. 531.

their relations to third persons, are to be considered as partners, in the same manner as individuals associated for the purpose of banking; or joint stock companies."[19]

§ 168. Partnership may exist as to single transaction.— It is not essential that the subject-matter of a partnership should be a permanent or continuing business; there may be a partnership merely for the consummation of a single transaction, venture or undertaking.[20] Thus, a partnership may be created by an agreement relating to a single transaction in the sale or purchase of land,[21] or in the sale of particular mining properties,[22] or the resale of wool purchased for such purpose.[23] It has also been held that an agreement whereby the parties are to co-operate in the sale of lands, on which one of them holds an option, and share in the profits, constitutes a partnership agreement.[24] On the other hand it has been held that advance

[19] Babb v. Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650.

[20] Harris v. Umsted, 79 Ark. 499, 96 S. W. 146; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Robinson v. Compher, 13 Colo. App. 343, 57 Pac. 754; Plunkett v. Dillon, 4 Houst. (Del.) 338; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354 (revd. 61 Kans. 602, 60 Pac. 314); Cochran v. Anderson County Nat. Bank, 83 Ky. 36, 6 Ky. L. 168; Ripley v. Colby, 23 N. H. 438; Clark v. Rumsey, 59 App. Div. (N. Y.) 435, 69 N. Y. S. 102; Demarest v. Koch, 129 N. Y. 218, 29 N. E. 296; Hulett v. Fairbanks, 40 Ohio St. 233; Yeoman v. Lasley, 40 Ohio St. 190; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Pierson v. Steinmyer, 4 Rich. (S. Car.) 309; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870; Williamson v. Nigh, 58 W. Va. 629, 53 S. E. 124; Westcott v. Gilman (Cal.), 150 Pac. 777; Shackleford v. Williams, 182 Ala. 87, 62 So. 54.

[21] Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354 (revd. 61 Kans. 602, 60 Pac. 314); Yeoman v. Lasley, 40 Ohio St. 190; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870, revg. (Tex. Civ. App.), 47 S. W. 29. See also Bank of Monroe v. Drew, 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255; Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327. See, however, Gottschalk v. Smith, 156 Ill. 377, 40 N. E. 937 (affg. 54 Ill. App. 341) to the contrary.

[22] Spencer v. Barnes, 25 Cal. App. 139, 142 Pac. 1088.

[23] Stundon v. Dahlenberg, 184 Mo. App. 381, 171 S. W. 37.

[24] Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589. See also Clark v. Emery,

of money to purchase and erect buildings in consideration of interest on the money advanced and one-half the profits of the sale, which profits are guaranteed to be equal at least to a certain sum, the advances and profits being secured by a mortgage, does not constitute the party advancing a partner with the other.[25] However, one distinction between a partnership and a joint adventure is, that a partnership ordinarily is formed for transacting a general business of some kind, while a joint adventure is formed for a single transaction.[26]

§ 169. Partnership for dealing in real estate.—A partnership may exist for the purpose of buying, dealing or speculating in land.[27] The elements essential to a partnership for dealing in real estate are those necessary to the formation of any other partnership, and whether there is a partnership depends more on the intention of the parties than anything else. The mere joint purchase of land does not make the owners partners.[28] A

58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503, for a case somewhat similar, in which it was held that no partnership was formed.

[25] Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343.

[26] Saunders v. McDonough (Ala.), 67 So. 591.

[27] Shaeffer v. Blair, 149 U. S. 248, 13 Sup. Ct. 856, 37 L. ed. 721; Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. ed. 104; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Pendleton v. Wambersie, 4 Cranch (U. S.) 73, 2 L. ed. 554; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Grant v. McArthur's Exrs., 153 Ky. 356, 155 S. W. 732; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354 (revd. 61 Kans. 602, 60 Pac. 314); Simpson v. Tenney, 41 Kans. 561, 21 Pac. 634; Winslow v. Young, 94 Maine 145, 47 Atl. 149; Dudley v. Littlefield, 21 Maine 418; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. 367; Corey v. Cadwell, 86 Mich. 570, 49 N. W. 611; Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235; Hunter v. Whitehead, 42 Mo. 524; Williams v. Gillies, 75 N. Y. 197; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Mitchell v. Tonkin, 109 App. Div. (N. Y.) 165, 95 N. Y. S. 669; Hulett v. Fairbanks, 40 Ohio St. 233; Ludlow v. Cooper, 4 Ohio St. 1; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870. See note, 5 L. R. A. (N. S.) 503.

[28] See § 124, ante; Clark v. Sidway,

partnership to deal in lands may be created by an oral agreement, and a written one is not essential.[29] Under the following circumstances the courts have held that partnerships to deal in lands were created; where lands were bought jointly for speculation, each to share equally in the net profits,[30] or in net profits less a commission to the one finding a purchaser,[31] or to share equally in purchase-money, expenses, and proceeds,[32] even though title is taken in the name of but one of those jointly interested,[33] if it is provided that the title is so taken for the benefit of all, or it appears from the agreement that it was clearly the intention of the parties to share expenses and profits as partners.

This rule holds in some cases where one party has advanced all the money, and the other has furnished services only, the person furnishing the money to be paid interest on the advances.[34] In a good many other cases, parties sharing in the profits of the sale of land have been held not to be partners, in most of which it seems that a portion of the profits was taken as interest, commission, or compensation for services.[35] This is especially true if there is no sharing in losses,[36] or in profits while undivided,[37]

142 U. S. 682, 12 Sup. Ct. 327, 35 L. ed. 1157; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Clark v. Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503.

[29] See post §§ 218, 219.

[30] Hodge v. Mitchell, 33 Minn. 389, 23 N. W. 547; Guibert v. Saunders, 45 Hun 589, 10 N. Y. St. 43; Hulett v. Fairbanks, 40 Ohio St. 233; Canada v. Barksdale, 84 Va. 742, 6 S. E. 10.

[31] Davenport v. Buchanan, 6 S. Dak. 376, 61 N. W. 47.

[32] Ludlow v. Cooper, 4 Ohio St. 1.

[33] Kayser v. Maugham, 8 Colo. 232, 6 Pac. 803; Heard v. Wilder, 81 Iowa 421, 46 N. W. 1075; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149.

[34] Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Corey v. Cadwell, 86 Mich. 570, 49 N. W. 611; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

[35] See §§ 75, 77, 80, ante. Seymour v. Freer, 8 Wall. (U. S.) 202, 19 L. ed. 306; Smith v. Garth, 32 Ala. 368; Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Durkee v. Gunn, 41 Kans. 496, 21 Pac. 637, 13 Am. St. 300; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Wakeman v. Somarindyck, 73 App. Div. 601, 76 N. Y. S. 815.

[36] Morton v. Nelson, 145 Ill. 586, 32 N. E. 916.

[37] Clark v. Emery, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503n.

and has been held even where the parties themselves termed their association a "partnership."[88] In many cases it has been held that, under the circumstances, those who shared in the profits and losses arising from the purchase and sale of lands were liable

[88] Thompson v. Holden, 117 Mo. 118, 22 S. W. 905. In the case of Winslow v. Young, 94 Maine 145, 47 Atl. 149, a syndicate was formed to buy certain lands for speculation, by tacit assent the title was taken by three of the parties as trustees, but the deed contained no declarations of trust and no names of beneficiaries, and there was never any agreement by the parties in interest, defining or limiting the trust, or the rights, powers and duties of the trustees, nor did the trustees make any declaration of trust. When the title was obtained, it was conveyed to the trustees subject to a mortgage, which the trustees agreed and assumed to pay without the knowledge of the other parties and without authority from them. The trustees paid the amount due on the mortgage and brought a bill in equity seeking contribution from the other parties. The court held that the parties to the agreement to purchase lands were not partners, and since the trustees had paid the mortgage voluntarily without authority, the other parties could not be compelled to contribute. The court said in the course of its opinion: "It may be conceded that under some circumstances, associated parties may be regarded in law as partners, when the parties themselves do not understand that a partnership exists. But before the law will imply such relation, contrary to the intention of the parties, it must appear not only that funds were contributed to a common object, but that the enterprise or business contemplated and intended to be carried on, is of such a character and purpose that it can not result in a successful issue if the proprietors are treated as tenants in common and not co-partners. * * * It is undoubtedly true that the purchase was speculative and that the proprietors expected their profits to arise from sales of the land. They did not contemplate building upon it or making other improvements, but simply to hold it for sale at advanced prices, which it was supposed would be obtained in a short time. There was therefore no necessity for a partnership to accomplish this end. Ownership as tenants in common was equally effective. The elements which justify a court in finding a partnership to result from the character of the business to be done are wanting. * * * One element of a partnership is a community of interest in the subject-matter of it. But that alone is insufficient. * * * Another element is that each partner from the relation itself becomes the agent of all the others, having the jus disponendi of its property, and authority to bind the firm by contracts, within the scope of the business, and upon dissolution of the partnership by death of one of its members, the survivors become entitled to retain and dispose of the partnership effects for a settlement of its affairs. In the present case, while there was community of interest, there was no element of agency in the individual parties. This objection might be met and overcome if by

as partners to third persons.[39] So the members of a joint stock company formed to deal in real estate have been held liable as partners,[40] in other cases those sharing in profits from the sale of lands have been held not liable as partners to third persons.[41]

§ 170. Illegal purpose or business.—A partnership which is formed for the purpose of carrying on an illegal business or one which is contrary to public policy is, at least to that extent, void.[42] Thus, where a partnership is formed for the purpose of illegally acquiring public coal lands, neither the partnership nor

agreement of all the proprietors the title had been taken by the trustee under an active and defined trust to manage and dispose of the property. But this was not the case. * * * Even if the payments of the several parties were regarded as payments to a common fund to purchase the property jointly, when the trustees took title without any trust declared by them or by the parties in interest and none was subsequently declared by agreement of all, the trust in Winslow and his associates resulted to the contributors in their several proportions, as an integral interest in the land and attached to it, and the individual owner could have compelled a conveyance of his individual share from the trustees, if his share was fully paid,—if not so paid, then upon payment of the amount due. Upon all the facts it is apparent that a partnership was not intended by the parties, nor can one result as matter of law."

[39] Morse v. Richmond, 97 Ill. 303 (affg. 6 Ill. App. 166); Straus v. Kohn, 83 Ill. App. 497; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354 (revd. 61 Kans. 602, 60 Pac. 314); Palliser v. Ehradt, 46 App. Div. 222, 61 N. Y. S. 191; Sage v. Sherman, 2 N. Y. 417; Fowler v. Stone's River Nat. Bank (Tenn.), 57 S. W. 209; Upton v. Johnson, 84 Wis. 8, 54 N. W. 266.

[40] Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213.

[41] Demarest v. Koch, 129 N. Y. 218, 29 N. E. 296 (affg. 26 Jones & S. 583, 9 N. Y. S. 726); Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343.

[42] Powell v. Maguire, 43 Cal. 11; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Tenney v. Foote, 95 Ill. 99; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124; Spaulding v. Nathan, 21 Ind. App. 122, 51 N. E. 742; Anderson's Admr. v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Stewart v. M'Intosh, 4 Har. & J. (Md.) 233; Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Dunham v. Presby, 120 Mass. 285; McGunn v. Hanlin, 29 Mich. 476; Durant v. Rhenier, 26 Minn. 362, 4 N. W. 610; Shriver v. McCloud, 20 Nebr. 474, 30 N. W. 534; Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Tucker v. Adams, 63 N. H. 361; Watson v. Murray, 23 N. J. Eq. 257; Kelly v. Devlin, 58 How. Pr. (N. Y.) 487 (aff. 47 N. Y. Super. Ct. 555); Warner v. Griswold, 8 Wend. (N. Y.) 665; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; King v. Winants, 71 N. Car. 469, 17 Am. Rep.

the party with whom it contracts can obtain relief under a contract made in furtherance of the original legal agreement.[43] It must be made plainly to appear, however, that the purposes for which the partnership is formed are illegal.[44]

§ 171. **Grounds of illegality.**—Partnerships may be illegal because they are against public policy or against positive law, statute or otherwise. They are often referred to, in a general way, under more divisions than above given, but it is submitted that all other divisions are really subdivisions of the two classes above given. On account of the fact that often both of the above classes may contain a particular offense, the statute governing the offense is simply declaratory of the public policy, there will be no attempt here to classify the various subdivisions under either of the above, but some of the particular subdivisions of one or both are hereafter given, which, if the object of a partnership, would render it illegal and invalid.

§ 172. **Sharing profits of crime.**—An agreement for sharing the profits of crime is one of the most conspicuous of those rendering the partnership invalid. An old English case, Everet v. Williams, not found in the reports but often referred to by the old writers, is too interesting and too much to the point to be here omitted, although its very existence is denied by some. There, it is said, one highwayman sued another with whom he had worked his occupation, for a partnership accounting of the result of their operations. Realizing the absurdity of their position, the plaintiff's lawyers drew up their bill in such a manner that the transactions appeared to be exchanges and not robberies,

11; Dudley v. Little, 2 Ohio 504, 15 Am. Dec. 575; Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Jackson v. Akron Brick Assn., 53 Ohio St. 303, 41 N. E. 257, 35 L. R. A. 287, 53 Am. St. 638; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; Watson v. Fletcher, 7 Grat. (Va.) 1; Fairbank v. Newton, 50 Wis. 628, 7 N. W. 543.

[43] Kennedy v. Lonabaugh, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913 E, 133n.

[44] Thwaites v. Coulthwaite (1896), 1 Ch. 496, 65 L. J. Ch. 238, 74 L. T. 164, 44 W. R. 295, 60 J. P. 218; Delamour v. Roger, 7 La. Ann. 152; Will-

the profits of which were over two thousand pounds, as alleged. In some manner the actual facts were made apparent, the bill was dismissed, at the costs of counsel who signed it; and the solicitors of the plaintiff were fined fifty pounds, each, and one of them deported. Both plaintiff and defendant were hanged. Whether or not the account is authentic, it at least shows the law as it then existed, relative to the effect of an agreement to share the profits of crime upon the attempted partnership. The same rule, of course, applies to other forms of crime, such as smuggling,[45] carrying on a gambling establishment, or lottery[46] (which includes speculating in futures or on margins),[47] bookmaking or illegal horseracing,[48] contracts in restraint of trade,[49] or, in fact, to any attempted partnership relation in any act which the law recognizes as a crime. There are decisions in several states that hold that an agreement to control prices is not illegal if the effect is not to prevent a healthy competition or to raise prices.[50]

Although one of the cases cited in support of this contention is an Ohio case, it is not the present Ohio law. A statute enacted several years ago, commonly known as the Valentine Act, which includes, as offenses, combinations, "to limit or reduce the production, or increase, or reduce, the price of merchandise or any commodity;" also, "to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner con-

iams v. Connor, 14 S. Car. 621; Whitcher v. Morey, 39 Vt. 459; Fairbank v. Leary, 40 Wis. 637.

[45] Biggs v. Laurence, 3 T. R. 454; Stewart v. Gibson, 7 Cl. & Fin. 707.

[46] Smith v. Richmond, 114 Ky. 303, 70 S. W. 846, 24 Ky. L. 1117, 102 Am. St. 283; Watson v. Murray, 23 N. J. Eq. 257; Watson v. Fletcher, 7 Grat. (Va.) 1; Berns v. Shaw, 65 Va. 667, 64 S. E. 930, 23 L. R. A. (N. S.) 522n (gambling).

[47] Tenney v. Foote, 95 Ill. 99.

[48] Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. 624; Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158.

[49] King v. Winants, 71 N. Car. 469, 17 Am. Rep. 11; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

[50] Breslin v. Brown, 24 Ohio St. 565, 15 Am. Rep. 627; Potter v. Morris &c. Dredging Co., 59 N. J. Eq. 422, 46 Atl. 537; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Fairbank v. Newton, 50 Wis. 628, 7 N. W. 543.

trolled or established, any article, etc., etc.," changed the Ohio law subsequent to the decision cited, and makes the mere combination to control and establish prices an offense, regardless of whether the purpose is or is not the raising of prices.[51] In other states partnership agreements to advance prices and prevent competition have been held unenforcible.[52] A partnership formed for the purpose of trading with persons inhabiting states declared in insurrection is illegal.[53] Where certain persons, relatives, agreed to file on different one-hundred-sixty-acre tracts of public coal lands, and convey them to a corporation to be formed, granting the corporation an option, such option was held illegal and void, and the agreement to obtain the coal lands was held a criminal conspiracy against the United States to obtain coal lands, since the statute allows an individual to enter only one hundred sixty acres of coal land, and an association only three hundred twenty acres.[54]

§ 173. Offenses against morality, or public welfare.—On account of the necessity of protecting the public morality, agreements contrary thereto, whether relating to partnership or otherwise, have been refused the countenance of the law from time immemorial, by statute, or, if there is no statute in any particular jurisdiction upon the particular offense, then upon the broad power of public policy. One member of a partnership which has for its purpose the renting of apartments for purposes of prostitution, can not maintain an action against the other for an accounting.[55]

It has been held that where a man and woman have lived together as husband and wife, though not married, legally, since

[51] Jackson v. Akron Brick Assn., 53 Ohio St. 303, 41 N. E. 257, 35 L. R. A. 287, 53 Am. St. 238.

[52] Chicago &c. R. Co. v. Wabash R. Co., 61 Fed. 993, 9 C. C. A. 659; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. 667.

[53] Snell v. Dwight, 120 Mass. 9.

[54] Kennedy v. Lonabaugh, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913 E, 133n.

[55] Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. 63.

the woman was in fact bound by a previous undissolved common law marriage, upon the death of the man, the woman is entitled to one-half the property, as a partner.[56] On the other hand, in another jurisdiction, where a woman had lived in meretricious relations with a man for years, knowing him to be married, it was held that such illicit relationship was not the consideration for a partnership between them, and she could not maintain an action against him for an accounting as a partner for the property accumulated by him.[57] A surviving partner has also been denied the right to an accounting against the deceased partner's executrix, where the partnership was formed to manufacture and sell distilled liquors, when the business was conducted and the licenses, state and federal, held in the deceased's name; and the state law required that the applicant for a distiller's license must state that he is the only person pecuniarily interested in the business, and the federal laws required every distiller to give the collector of the district written notice as to the parties interested in the business.[58] A secret partnership agreement to stifle or diminish competitive bidding on public work or letting is void, such contracts being against public policy.[59] An agreement to

[56] Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533.

[57] Vincent v. Moriarty, 52 N. Y. S. 519, 31 App. Div. 484.

[58] Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365.

[59] McMullan v. Hoffman, 69 Fed. 509 (fictitious bid made to give appearance of competition); Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410 (affd. 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. 839) (fictitious bid); Brady v. Yost, 6 Idaho 273, 55 Pac. 542; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124; Edelen v. Newman, 5 Ky. L. 120 (combination among liverymen to prevent competition between themselves in bidding for contract to carry mail to and from terminal office of a railroad company); Hannah v. Fife, 27 Mich. 172; Pendleton v. Asbury, 104 Mo. App. 723, 78 S. W. 651 (combination between newspapers of county); Whalen v. Harrison, 26 Mont. 316, 67 Pac. 934; Baird v. Sheehan, 38 App. Div. (N. Y.) 7, 56 N. Y. S. 228 (affd. 166 N. Y. 631, 60 N. E. 1107); Coverly v. Terminal Warehouse Co., 85 App. Div. (N. Y.) 488, 83 N. Y. S. 369 (affd. 178 N. Y. 602), 70 N. E. 1097 (lease of dock belonging to city of New York); Daily v. Hollis, 27 Tex. Civ. App. 570, 66 S. W. 586 (contractors agreed as to amount that each should bid; successful bidder to share profits). A contract entered into by an administratrix, which would induce her to discourage purchasers from attending

purchase officers' and court fees is illegal, but there may be a right to an accounting as to other business embraced in the partnership agreement, where the funds obtained from the purchase of fees were not used in the other business.[60] It is of course well settled that compensation can not be recovered for services rendered in the performance of an illegal lobbying contract.[61] So, a copartner who expends money for lobbying purposes can not compel contribution on the part of the other partner nor will the partner making such expenditures be entitled to a credit for the amount so expended when chargeable with receipts.[62] A partnership agreement between a president of a bank, who agreed to advance capital, and another party, for land and cattle transactions, was illegal because money was loaned to the partners from the bank of which one was president.[63]

§ 174. Partnership in public office.—As a general rule there can be no partnership in a public office and an agreement to transfer to or divide with another the emoluments of a public office is void, because against public policy.[64] An agreement between partners to divide equally the salary of the office of prosecuting attorney, to which one of them was elected, is void and unenforcible, since the tendency of such a contract is to injure the public.[65] However, it was earlier held in the same state that

her sale as administratrix, is against public policy. Beatrice Creamery Co. v. Fitzgerald, 70 Nebr. 308, 97 N. W. 301.

[60] Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363.

[61] Cary v. Western Union Tel. Co., 47 Hun (N. Y.) 610, 20 Abb. N. Cas. (N. Y.) 333, 15 N. Y. St. 204; Globe Works v. United States, 45 Ct. Cl. (U. S.) 497.

[62] McDonald v. Buckstaff, 56 Nebr. 88, 76 N. W. 476.

[63] Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319, rehearing denied Id. 609.

[64] Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Martin v. Wade, 37 Cal. 168; Campbell v. Offutt, 151 Ky. 229, 151 S. W. 403; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, Ann. Cas. 1913 B, 1078; McGowan v. New Orleans, 118 La. 429, 10 Ann. Cas. 633; Glover v. Taylor, 38 La. Ann. 634; Bailey v. Sibley Quarry Co., 166 Mich. 321, 129 N. W. 17; First Nat. Bank of Columbus v. State, 68 Nebr. 482, 94 N. W. 633, 4 Ann. Cas. 423; Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Pa. St. 282; Waldo v. Martin, 4 B. & C. 319, 10 E. C. L. 341, 2 Car. & P. 1, 12 E. C. L. 3, 6 Dowl. & R. 364, 28 Rev. Rep. 289.

[65] Anderson v. Branstrom, 173

an agreement by a public officer that his salary should be assets of a partnership would be enforced, since this was not considered as the assignment of unearned salary as a public officer, but as an agreement as to the disposition of the salary when earned.[66] There can be no partnership in the office of administrator.[67]

§ 175. Effect of illegality generally—Accounting to partner.—As shown in preceding sections the courts generally will not recognize a partnership contract to carry on an illegal business or to conduct a legal business in an unlawful manner, and will not enforce its claims against third parties nor compel an accounting or contribution between the parties.[68] Where a partner who is innocent of any connection with the wrong-doing asks an accounting and division of the profits, the copartner, in order to defeat a division, can not show that he made the profits by cheating customers,[69] or otherwise illegally,[70] in order to avoid rendering his share of profits to the partner seeking an accounting.

So where the purpose or business was not illegal or immoral, a partner will not be permitted to avoid sharing of loss by setting

Mich. 157, 139 N. W. 40, 43 L. R. A. (N. S.) 422n, Ann. Cas. 1914 D, 817n.

[66] McGregor v. McGregor, 130 Mich. 505, 90 N. W. 284, 97 Am. St. 492. See also Thurston v. Fairman, 9 Hun (N. Y.) 584.

[67] Seely's Admr. v. Beck, 42 Mo. 143.

[68] See cases cited in note 42, § 170; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117; Marine &c. Ins. Bank v. Megar, Dud. (Ga.) 83; Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. 624; Smith v. Richmond, 114 Ky. 303, 70 S. W. 846, 24 Ky. L. 1117, 102 Am. St. 283; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404; Providence Mach. Co. v. Browning, 72 S. Car. 424, 52 S. E. 117; Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837; Watson v. Fletcher, 7 Grat. (Va.) 1; Harris v. Amery, L. R. 1 C. P. 148, Harr. & R. 294, 12 Jur. (N. S.) 165, 35 L. J. C. P. 89, 13 L. T. Rep. (N. S.) 504, 14 W. R. 199.

[69] Van Tine v. Hilands, 131 Fed. 124; Blalock v. Copeland, 23 Ky. L. 1455, 65 S. W. 349; Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. 419; Thwaites v. Coulthwaite (1896), 1 Ch. 496, 65 L. J. Ch. 238, 74 L. T. 164, 44 W. R. 295, 60 J. P. 218.

[70] Jones v. Davidson, 2 Sneed. (Tenn.) 447; Corralitos Co. v. Mackay, 31 Tex. Civ. App. 316, 72 S. W. 624.

up that they were the result of a sharp practice in business which he suggested.[71]

§ 176. Effect of illegality—Severable contract.—As above indicated, illegality in the object of an attempted partnership makes it invalid. The illegality, however, in order to render the partnership invalid, must touch the whole partnership, and, if the business of the partnership be severable, and some parts of the business are illegal, and some parts legal, the relation will stand as to the parts which are legal, and will be illegal as to the illegal parts.[72] Thus a partnership in breeding, training and racing horses is legal, and may be settled in court, but in the settlement one partner is not entitled to credit for money paid by him on a bet on horses made for the firm, though there was a promise on the part of the firm to repay him.[73]

§ 177. Effect of illegality—Partner required to turn over proceeds of illegal transaction.—Contrary to the general rule and on the principle that their duty to turn over the proceeds of an illegal transaction is collateral to the transaction itself, agents[74]

[71] Shriver v. McCloud, 20 Nebr. 474, 30 N. W. 534.

[72] Northrup v. Phillips, 99 Ill. 449; Anderson v. Powell, 44 Iowa 20; Dunham v. Presby, 120 Mass. 285; Willson v. Owen, 30 Mich. 474; Todd v. Rafferty's Admr., 30 N. J. Eq. 254; Lane v. Thomas, 37 Tex. 157; Whitcher v. Morey, 39 Vt. 459. See Citizens' Nat. Bank v. Mitchell, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371, as to the right of persons to form a partnership to carry on a business in which it is necessary that the person conducting that business be legally qualified to do so. For a case holding that both partners need not possess the legal qualifications, in case one of them has such qualifications and the business is to be carried on by him, see Harland v. Lilienthal, 53 N. Y. 438.

[73] Central Trust &c. Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 23 Ky. L. 1905, 56 L. R. A. 479, 99 Am. St. 317.

[74] State v. Baltimore &c. R. Co., 34 Md. 344; Haacke v. Knights of Liberty Social Club, 76 Md. 429, 25 Atl. 422; Willson v. Owen, 30 Mich. 474; Gilliam v. Brown, 43 Miss. 641; Cheuvront v. Horner, 62 W. Va. 476, 59 S. E. 964. Contra: Clarke &c. Co. v. Brown, 77 Ga. 606, 4 Am. St. 98; Alexander v. Barker, 64 Kans. 396, 67 Pac. 829. See also Daniels v. Barney, 22 Ind. 207. This latter case holds that the principal may recover unless the agent engaged in the unlawful transaction at the orders of the principal. Compare also with Houts v. Scharbaner, 46 Tex. Civ. App. 605, 103 S. W. 679, where vendor's agent falsely represented to the vendees that he was a joint purchaser with them.

and partners[75] have been required to turn over and account for the proceeds of an unlawful transaction, especially when the transaction is completed and a division of the profits has been agreed on.[76] The illegality of one contract does not extend to another unless the two are united either in consideration or promise.[77]

It was held the vendor could not recover money paid his agent in furtherance of and in accordance with their scheme to mislead and defraud the vendees. But a vendee or purchaser who appoints an agent to consummate the deal may recover from his agent commissions paid to the latter by the vendor, notwithstanding the vendee intends to dispose of the property in an illegal manner. Commercial Club v. Davis, 136 Mo. App. 583, 118 S. W. 668.. In case the party from whom the proceeds are sought to be recovered was not merely an agent or depositary but a co-conspirator, no recovery can be had. Feltner v. Feltner, 132 Ky. 705, 116 S. W. 1196.

[75] This doctrine probably originated in Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Fryer v. Harker, 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477n; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172; Gilliam v. Brown, 43 Miss. 641; Crescent Ins. Co. v. Bear, 23 Fla. 50, 1 So. 318, 11 Am. St. 331; Andrews v. New Orleans Brewing Assn., 74 Miss. 362, 20 So. 837, 60 Am. St. 509. "Although a contract may be illegal, it does not follow that it is illegal or immoral for the parties to it, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The vice of the contract does not enter into such settlement." Mitchell v. Fish, 97 Ark. 444, 134 S. W. 940, 36 L. R. A. (N. S.) 838n, quoting from De Leon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101. See also Simon v. Garlitz (Tex. Civ. App.), 133 S. W. 461. But compare Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. 837. See, however, Butler v. Agnew, 9 Cal. App. 327, 99 Pac. 395; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Snell v. Dwight, 120 Mass. 9; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Coffey v. Burke, 132 App. Div. (N. Y.) 128, 116 N. Y. S. 514; Citizens' Nat. Bank v. Mitchell, 24 Okla. 488, 103 Pac. 720; Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365 (in which it was held that since recovery could not be had without relying on the illegal partnership it would be denied. This was an action for an accounting brought by a surviving partner against the executrix of the deceased partner).

[76] Mitchell v. Fish, 97 Ark. 444, 134 S. W. 940, 36 L. R. A. (N. S.) 838n. See also McRae v. Warmack, 98 Ark. 52, 135 S. W. 807 (as to the right of an assignee of a life insurance policy to recover the amount of premiums paid by him and the amount which the intestate actually owed him).

[77] Kansas City &c. Brick Co. v. National Surety Co., 167 Fed. 496 (action to recover for brick furnished a contractor with which to make a public improvement, the contract for the improvement being illegal because let in violation of the statute governing such matters.)

CHAPTER VII

WHO MAY BE PARTNERS

SECTION

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§ 185. **Generally.**—Any person who has capacity to contract may make a valid contract of partnership. The Uniform Partnership Act provides[1] that, "A partnership is an association of two or more persons to carry on as co-owners a business for profit," and that "person" shall be considered to include individuals, partnerships, corporations, and other associations. Mr. Justice Lindley says:[2] "By the law of this country, a valid contract of partnership can be entered into between any persons who are not under the disabilities of minority or unsoundness of mind, and are not convicts within the meaning of 33 and 34 Vict. ch. 23. * * * There are certain trades, businesses and professions which can not be lawfully carried on, either solely or in partnership, unless some statutory requisite has been complied with, but

[1] Uniform Partnership Act, § 6, cl. 1, § 2, cl. 3.

[2] Lindley, Partnership (8 ed.), p. 86.

now that the disabilities under which spiritual persons formerly lay have been removed, the author is not aware that there is any class of persons (except convicts), who, being of sound mind and over twenty-one years of age, are rendered incapable of becoming members of partnerships. * * * Agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent. Hence there is nothing to prevent a person who is not sui juris from being a partner. But if any such person is a partner, his or her want of capacity to contract will necessarily give rise to consequences deserving special notice."

§ 186. **Aliens.**—Alien friends may be partners, but if war breaks out between their respective countries they become alien enemies, and the partnership is dissolved or suspended.[3] By the law of nations all intercourse between citizens of countries at war with each other which is inconsistent with a state of hostilities is prohibited. Within that prohibition is included any act or contract which tends to increase the enemy's resources, and every kind of trading or commercial dealing or intercourse, directly or indirectly, between the two countries in any form.[4]

[3] McAdams v. Hawes, 9 Bush (Ky.) 15; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789.

[4] Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Shaw v. Carlile, 9 Heisk. (Tenn.) 594; Briggs v. United States, 143 U. S. 346, 36 L. ed. 180, 12 Sup. Ct. 391, 27 Ct. Cl. 564. As to status of citizens of the North and South during the Civil War, see The Prize Cases, 2 Black (U. S.) 635, 17 L. ed. 459.

The following agreements are recognized as valid: (1) agreements for the ransom of persons; (2) property from the enemy's hands; (Brandon v. Nesbit, 6 T. R. 28, 3 R. R. 109; Goodrich v. Gordon, 15 Johns. (N. Y.) 6; Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373); (3) contracts by prisoners of war made for their subsistence while in the hands of the enemy (Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373); (4) or contracts to enable a shipmaster in an enemy's harbor to return the vessel to her home port (Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373; Hallet v. Jenks, 3 Cranch (U. S.) 210, 2 L. ed. 414).

Except as mentioned in the preceding note an alien enemy can not, except with the license or permission of the government,[5] make a valid contract,[6] nor enforce a prior existing agreement,[7] so long as the war continues.[8] Ordinarily, contracts entered into prior to the declaration of war are merely suspended during its continuance and revive upon its termination.[9] But commercial partnerships or other executory contracts, continuing in their nature, which can not be performed without violating the laws governing a state of war, are dissolved thereby. This applies to any contract entered into prior to hostilities that contemplates or

[5] Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188. License may be implied from such aliens being permitted to remain in the country after the outbreak of hostilities. Zacharie v. Godfrey, 50 Ill. 186, 99 Am. Dec. 506; Parkinson v. Wentworth, 11 Mass. 26; Hutchinson v. Brock, 11 Mass. 119; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Clarke v. Morey, 10 Johns. (N. Y.) 68; Bradwell v. Weeks, 13 Johns. (N. Y.) 1; Russel v. Skipwith, 6 Bin. (Pa.) 241; Otteridge v. Thompson, 2 Cranch (U. S.) 108, Fed. Cas. No. 10618. It may be implied from a general relaxation of the rule against nonintercourse. Blackburne v. Thompson, 15 East 81, 3 Camp. 61, 13 R. R. 382.

[6] Hill v. Baker, 32 Iowa 302, 7 Am. Rep. 193; Phillips v. Hatch, 1 Dill. (U. S.) 571, Fed. Cas. No. 11094; Wright v. Graham, 4 W. Va. 430.

[7] Semmes v. City Fire Ins. Co., 36 Conn. 543; Brooke v. Filer, 35 Ind. 402; Bell v. Chapman, 10 Johns. (N. Y.) 183; Jackson v. Decker, 11 Johns. (N. Y.) 418; Blackwell v. Willard, 65 N. Car. 555, 6 Am. Rep. 749; Wilcox v. Henry, 1 Dall. (U. S.) 69, 1 L. ed. 41; Mumford v. Mumford, 1 Gall. (U. S.) 366, Fed. Cas. No. 9918; Haymond v. Camden, 22 W. Va. 180; Sturm v. Fleming, 22 W. Va. 404.

[8] Marchand v. Coyle, 18 La. Ann. 632; Shotwell v. Ellis, 42 Miss. 439; In re The Rapid, 8 Cranch (U. S.) 155, 3 L. ed. 520; In re The Eliza, 2 Gall. (U. S.) 4; Crawford v. The William Penn, 3 Wash. (U. S.) 484, Fed. Cas. No. 3373.

[9] Harmon v. Kingston, 3 Camp. 150, 13 R. R. 775; Flindt v. Waters, 15 East 260, 3 R. R. 457; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. 221; New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; Ross v. Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730; Brown v. Hiatts, 15 Wall. (U. S.) 177, 21 L. ed. 128; Semmes v. City Fire Ins. Co., Fed. Cas. No. 12651, 6 Blatchf. (U. S.) 445 (revd. 13 Wall. (U. S.) 158, 20 L. ed. 590); Hanger v. Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939; Dunlop v. Ball, 2 Cranch (U. S.) 180, 2 L. ed. 247; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Stiles v. Easley, 51 Ill. 275; Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639; Whelan v. Cook, 29 Md. 1; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Hutchinson v. Brock, 11 Mass. 119; Bell v. Chapman, 10 Johns.

necessitates intercourse with the enemy during hostilities.[10] Nor can a contract not licensed by the government, entered into during the war, be enforced after peace is declared.[11] Legal proceedings may, however, be maintained on a subsisting contract against an alien enemy or his property, if found within the jurisdiction of the courts of this country; if this were not true an enemy would be more advantageously situated than a friend.[12]

§ 187. Felons and convicts.—It was formerly the rule in England that a felon's or outlaw's share in a partnership vested in the crown.[13] Then a felon or outlaw could contract but not sue until removal of his disability,[14] nor could he plead his own dis-

(N. Y.) 183; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Kiersted v. Orange, 1 Hun (N. Y.) 151, 54 How. Pr. (N. Y.) 29 (revd. 69 N. Y. 343, 25 Am. Rep. 199); Sanderson v. Morgan, 39 N. Y. 231; Ahnert v. Zaun, 40 Wis. 622.

[10] Esposito v. Bowden, 7 El. & Bl. 763, 27 L. J. Q. B. 17, 3 Jur. (N. S.) 1209, 5 W. R. 732; Williams v. State, 37 Ark. 463; Yeaton v. Berney, 62 Ill. 61; Brown v. Delano, 12 Mass. 370; Mutual Ben. Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741; Griswold v. Waddington, 15 Johns. (N. Y.) 57 (aff. 16 Johns. (N. Y.) 438); Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; Cohen v. New York &c. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Bank of New Orleans v. Matthews, 49 N. Y. 12; Shaw v. Carlile, 9 Heisk. (Tenn.) 594; The William Bagaley v. United States, 5 Wall. (U. S.) 377, 18 L. ed. 583; University v. Finch, 18 Wall. (U. S.) 106, 21 L. ed. 818; Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188; Cramer v. United States, 7 Ct. Cl. (U. S.) 302; Booker v. Kirkpatrick, 26 Grat. (Va.) 145.

[11] United States v. Grossmayer, 9 Wall. (U. S.) 72, 19 L. ed. 627; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; Hart v. United States, 15 Ct. Cl. (U. S.) 414; Seymour v. Bailey, 66 Ill. 288; Mixer v. Sibley, 53 Ill. 61; Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639; Foreman v. Carter, 9 Kans. 674; Buford v. Speed, 11 Bush (Ky.) 338; Dorsey v. Thompson, 37 Md. 25; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617 and note; Dejarnette v. DeGiverille, 56 Mo. 440; Willison v. Pattison, 7 Taunt. 439, 1 Moore 133, 18 R. R. 525.

[12] McVeigh v. United States, 11 Wall. (U. S.) 259, 20 L. ed. 80; University v. Finch, 18 Wall. (U. S.) 106, 21 L. ed. 818. The courts are closed, however, against the alien enemy during the continuance of hostilities except with permission of the government. Wells v. Williams, 1 Salk. 46; Hoskins v. Gentry, 2 Duv. (Ky.) 285; Dorsey v. Thompson, 37 Md. 25; Clarke v. Morey, 10 Johns. (N. Y.) 68.

[13] Lindley Partnership (8 ed.), p. 89; Bacon's Abr., Felony and Outlawry.

[14] See note 13 supra.

ability in an action against him.[15] Now, felons in England are disabled from suing or contracting, but their property is not forfeited, and the crown may place the custody and management of his property in an administrator, or an interim curator.[16] In this country the disabilities which attach to a convict under the common law do not generally obtain.[17] He may enter into contracts and sue and be sued thereon.[18]

By statute in most states certain disabilities are imposed on convicts during their term of imprisonment, and reference should be made to such statutes in order to determine what modifications of the general law have been made thereby.[19]

§ 188. Infants.—Since the contracts of an infant are voidable, and not void, he may enter into a partnership agreement, and a contract of partnership between an infant and an adult is not void[20] but is voidable at the infant's option.[21] Consequently

[15] Foster Cr. Law, p. 61.

[16] Act 33 and 34 Vict., ch. 23; Lindley Partnership (8 ed.), p. 89.

[17] Elliott Contracts, § 266; In re Nerac, 35 Cal. 392, 95 Am. Dec. 111; Cannon v. Windsor, 1 Houst. (Del.) 143; Willingham v. King, 23 Fla. 478, 2 So. 851; Presbury v. Hull, 34 Mo. 29; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Frazer v. Fulcher, 17 Ohio 260; Kenyon v. Sanders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232; Davis v. Laning, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. 784.

[18] Willingham v. King, 23 Fla. 478, 2 So. 851; Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368; Stephani v. Lent, 30 Misc. (N. Y.) 346, 63 N. Y. S. 471; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Kenyon v. Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

[19] For illustration of the nature and effect of statutes taking away the civil rights of convicts, see In re Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. 62; Gray v. Stewart, 70 Kans. 429, 78 Pac. 852, 109 Am. St. 461; Harmon v. Bowers, 78 Kans. 135, 96 Pac. 51, 17 L. R. A. (N. S.) 502n; Smith v. Becker, 62 Kans. 541, 64 Pac. 70, 53 L. R. A. 141; Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. 368.

[20] Osburn v. Farr, 42 Mich. 134, 3 N. W. 299.

[21] Latrobe v. Deitrich, 114 Md. 8, 78 Atl. 983; Mehlhop v. Rae, 90 Iowa 30, 57 N. W. 650; Vinsen v. Lockard, 7 Bush (Ky.) 458; Bush v. Linthicum, 59 Md. 344; Dana v. Stearns, 3 Cush. (Mass.) 372; Osburn v. Farr, 42 Mich. 134, 3 N. W. 299; Goodnow v. Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; Kerr v. Bell, 44 Mo. 120; Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943; Gay v. Johnson, 32 N. H. 167; Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066; Bixler v. Kresge, 169 Pa. 405, 32 Atl. 414, 47 Am. St. 920; Miller v. Sims, 2 Hill (S. Car.) 479;

he may avoid being held liable by the partnership creditors. No individual liability attaches to him upon his plea of infancy,[22] and he may usually rescind his contract during infancy and thus escape liability,[23] nor can he be held liable by the adult member of the firm who settles the partnership liabilities.[24] The infant may even avoid liability for the partnership debts without disaffirming his contract with the partner.[25] In one case it was said:[26] "There can be no question but that an infant may become interested in business as a general partner. Nothing forbade it at common law and nothing in the statutory law now forbids it. His infancy was a factor in the situation, which enabled him to disaffirm his obligations and agreements, and in that respect, the privilege was a personal one to himself. Infancy does not disable one from entering into contracts and so long as the infant does not avail himself of the privilege to set up his infancy in bar of, or to avoid an obligation, his position, and his acts are those of any responsible person. Any other view of his situation would lead to holding all his acts and engagements void; whereas they are voidable merely at his election."

However, courts attempt to prevent the minor from gaining an undue advantage from his disability. Consequently it is held

Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

[22] Conklin v. Ogborn, 7 Ind. 553; Mehlhop v. Rae, 90 Iowa 30, 57 N. W. 650; James v. Alford, 15 La. Ann. 506; Neal v. Berry, 86 Maine 193, 29 Atl. 987; Latrobe v. Dietrich, 114 Md. 8, 78 Atl. 983; Bush v. Linthicum, 59 Md. 344; Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27n; Mason v. Wright, 13 Metc. (Mass.) 306; Osburn v. Farr, 42 Mich. 134, 3 N. W. 299; Dunton v. Brown, 31 Mich. 182; Folds v. Allardt, 35 Minn. 488, 29 N. W. 201; Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943; Avery v. Fisher, 28 Hun (N. Y.) 508; Goode v. Harrison, 5 B. & Ald. 147, 24 R. R. 307; Murphy v. Yeomans, 29 U. C. C. P. 421; Woods v. Woods, 3 Manitoba 33.

[23] See Elliott Contracts, Infants, ch. 11; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379. Contra: Dunton v. Brown, 31 Mich. 182.

[24] Neal v. Berry, 86 Maine 193, 29 Atl. 987.

[25] Mehlhop v. Rae, 90 Iowa 30, 57 N. W. 650; Conary v. Sawyer, 92 Maine 463, 43 Atl. 27, 69 Am. St. 525; Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27n. See, however, Miller v. Sims, 2 Hill (S. Car.) 479; Salinas v. Bennett, 33 S. Car. 285, 11 S. E. 968.

[26] Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066.

by the weight of authority that he can not at the same time set up his disability to relieve himself of the firm's debts and retain possession of the firm's assets.[27] It follows that in the absence of any fraud practiced on the infant in order to induce him to enter into the partnership relation the minor can not rescind his partnership agreement and recover additions made by him to the assets of the firm. He is entitled to only his pro rata share of the assets remaining after the settlement of the firm's liabilities.[28]

[27] Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Latrobe v. Dietrich, 114 Md. 8, 78 Atl. 983; Bush v. Linthicum, 59 Md. 344; Pelletier v. Couture, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Gordon v. Miller, 111 Mo. App. 342, 85 S. W. 943; Yates v. Lyon, 61 N. Y. 344, revg. Yates v. Lyon, 61 Barb. (N. Y.) 205. See also Richards v. Hellen, 153 Iowa 66, 133 N. W. 393. "The plaintiff, however, contends that inasmuch as he was a minor, and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as has been fully paid for at the time when insolvency proceedings were instituted. We do not think that such a contention is maintainable, either on principle or on authority. * * * It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for, as a partner, such goods having been paid for by the firm, and being partnership assets." Conary v. Sawyer, 92 Maine 463, 43 Atl. 27, 69 Am. St. 525. In the case of Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. 379, it is said: "The business was not, it is true, a successful one, but this in the absence of fraudulent representations on the part of the appellant can not affect the question. * * * Where money is paid by a minor in consideration of being admitted as a partner into the business of the appellant (the adult), and he does become and remain a partner for a given time he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant." See also, Wilhelm v. Hardman, 13 Md. 140, in which it is said: "Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he can not avoid it, and recover back his money. The rule which protects infants from liability on contracts will be allowed to operate reciprocally where it can be so applied. It is not too much to say that if an infant goes into a mercantile venture which proves unsuccessful he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital it hardly seems equitable that the creditor of his firm should, either directly or indirectly, be called upon for reimbursement." Yates v. Lyon, 61 N. Y. 344; 11 Columbia Law Rev., p. 470.

[28] Ex parte Taylor, 8 DeG. M. & G. 254; Latrobe v. Dietrich, 114 Md. 8, 78 Atl. 983; Adams v. Beall, 67 Md.

If a minor falsely represents that he was of age, and enters into partnership with an adult who relied on the truth of his statement, the adult may, as between them, dissolve the partnership and incur no liability.[29] While a minor acts as partner, like any other partner, he ordinarily has all the rights and powers of a partner to bind the firm by his acts, within the scope of the partnership business, and is an agent for the firm.[30] No one but the minor can take advantage of his disability, for it is a personal disqualifica-

53, 8 Atl. 664, 1 Am. St. 379; Page v. Morse, 128 Mass. 99; Moley v. Brine, 120 Mass. 324; Breed v. Judd, 1 Gray (Mass.) 455. The adult partner has the right to insist upon the assets of the firm being applied to the payment of the firm's debts and the infant's right to rescind is subject to this equity. Hill v. Bell, 111 Mo. 35, 19 S. W. 959. In regard to the case so holding it is said in the note to the case of Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. 604: The broad views expressed to the effect "that the assets of a partnership should be appropriated to the satisfaction of firm creditors over the claims of an infant partner, appear to us to be a departure from the general principles governing the liability of infants on their contracts. Why the interest of the infant in the partnership assets should be subjected by implication of law to the claims of creditors of the firm, when it is perfectly well settled that an infant may repudiate any security, as a mortgage, expressly given by him, is not clear. Of course, if an infant would rescind a contract he may be obliged to restore the consideration he may have received, provided he still retains it; but the rule as stated here makes no distinction between such creditors who have disposed of property to the firm, which it still retains, and those creditors who are not in that condition. If it be said that the infant must restore an equivalent, if he have not the original consideration, the rule should not have stopped with the firm assets, but should at least make the infant answerable to the extent of any property which may belong to him. The question can not be regarded as settled." The decisions holding that an infant can not recover money or other assets advanced by him to the firm seem erroneous. All the members of the firm whether infants or otherwise have a lien on the firm assets. It would be more nearly correct to hold the infant unable to recover where the rights of creditors have intervened on equitable grounds. The infant has, the same as other members of the partnership, a lien on the firm assets, but the creditors of the firm take precedence over the lien of the partners, even defeating the lien of an infant partner. See Conn v. Boutwell, 101 Miss. 353, 58 So. 105. See also Sparman v. Kiem, 83 N. Y. 245, 9 Abb. N. C. 1, in which it is held that an infant partner may recover money which he was induced to invest in business on restoring the benefits received from the partnership. 11 Columbia Law Rev., p. 470.

[29] Bush v. Linthicum, 59 Md. 344.

[30] Bush v. Linthicum, 59 Md. 344.

tion.[31] If the firm becomes insolvent, the minor partner may take advantage of his infancy, disaffirm the partnership contract, and leave his partners to bear all the obligations of the firm, even those which he himself created.[32] The effect of his peculiar situation is that he can claim his proportion of profits, if there are profits, but can not be compelled to share losses against his will. It is possible that on disaffirming his partnership contract he would not be allowed to withdraw his portion of the capital invested.[33]

The partnership agreement of an infant, being voidable only, may of course be ratified by him on reaching his majority and by so doing he becomes liable for the firm obligations incurred during his minority.[34] A minor's continuation to act as a part-

[31] Brown v. Hartford Fire Ins. Co., 117 Mass. 479; Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066; Beardsley v. Hotchkiss, 96 N. Y. 201.

[32] Gay v. Johnson, 32 N. H. 167; Whittemore v. Elliott, 7 Hun (N. Y.) 518.

[33] Justice Lindley says, Lindley Partnership (Ewell's ed.), p. 82: "Moreover, notwithstanding the general irresponsibility of an infant, he can not, as against his copartners, insist that in taking the partnership accounts he shall be credited with profits and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits. So an infant can not hold shares and decline to pay the calls payable in respect of them. He may, if he chooses, repudiate the shares, and so get rid of his liabilities, but if he does not repudiate the shares he must pay calls like any other shareholder." Cork &c. R. Co. v. Cazenove, 10 Q. B. 935, 11 Jur. 802; Leeds &c. R. Co. v. Fearnley, 4 Ex. 26, 7 D. & L. 68, 18 L. J. Ex. 330; L. & N. W. R. Co. v. M'Michael, 5 Ex. 114, 20 L. J. Ex. 97, 15 Jur. 132.

[34] Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478. He even renders himself liable on claims of which he was entirely ignorant at the time. Miller v. Sims, 2 Hill (S. Car.) 479. By some jurisdictions it is held that the act whereby an infant attempts to appoint an agent is void and that he therefore can not ratify the act of such agent. Consequently it has been contended that an infant could not ratify the acts of his partner since he was incapable of communicating authority to such partner to contract for him and that the attempt to communicate such authority being void it is not subject to a subsequent ratification. This contention was, however, overruled, it being held that the infant might ratify such an agreement. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. That one of the general partners is an infant does not affect the liability of a special partner. Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E.

ner, after coming of age, ratifies the partnership agreement, without any express declaration, and he is then responsible to the same extent as any other partner for all obligations contracted after his coming of age, and it would seem, for the debts contracted by the firm before he came of age, and while he was a partner, but apparently this point has not yet been settled by decision. It has been held that an infant who holds himself out as a partner is not even liable to a person who trusts to his representations, not knowing him to be under age.[35] An infant who has obtained advantage from a partnership contract, on attempting to avoid it, must usually restore the contracting party to the same position as if no contract had been entered into.[36] However, there is a somewhat different liability of an infant at equity, as distinguished from his complete legal irresponsibility as a partner. Justice Lindley says:[37] "But an infant who is guilty of fraud is not so free from liability in equity as he is at law;[38] and equitable as distinguished from legal relief, e. g., rescission of contract,[39] or an injunction[40] may be obtained against him, and he may be made to pay the costs of the action."[41] In accordance with these principles, although, as a rule, an infant can not be made bankrupt,[42] yet if he fraudulently represents himself as of

1066. Yates v. Lyon, 61 N. Y. 344, holds that an assignment made by copartners is not fraudulent and void in law because one of the assignors is an infant, and if the infant ratifies the assignment on reaching his majority no fraud can be claimed because of the infancy. See also Kingman v. Perkins, 105 Mass. 111, in which it is held that an infant's assignment of a debt can not be avoided by his creditors because of his nonage.

[35] Lindley Partnership (Ewell's ed.), p. 81; Green v. Greenbank, 2 Marsh. 485.

[36] Lindley Partnership (Ewell's ed.), p. 83, citing Holmes v. Blogg, 2 Moore 552, 19 R. R. 445; Ex parte Taylor, 8 DeG. M. & G. 254, 25 L. J. Bk. 35, 2 Jur. (N. S.) 220, 4 W. R. 305; Hamilton v. Vaughan-Sherrin Electrical Engineering Co., 3 Ch. 589 (1894), 63 L. J. Ch. 795, 8 R. 750, 71 L. T. 325, 43 W. R. 126.

[37] Lindley Partnership (8th ed.), p. 91.

[38] See Wright v. Snowe, 2 DeG. & S. M. 321.

[39] Lempriere v. Lange, 12 Ch. Div. 675, 41 L. T. 378, 27 W. R. 879.

[40] Woolf v. Woolf (1899), 1 Ch. 343, where an infant was restrained from carrying on his business in such a way as to represent it as that of the plaintiff.

[41] See cases cited in last two notes.

[42] Lovell v. Beauchamp (1894), A.

age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate.[43]

§ 189. **Insane persons.**—On the same principle applying to the partnership agreements of infants it would seem that a partnership agreement entered into in good faith with an insane person, not under guardianship and in ignorance of such person's condition is valid until disaffirmed.[44] But any dealings with an insane partner when his lunacy is known are liable to be impeached.[45] Mr. Lindley says that, as an insane person not formally adjudged insane is bound by a contract entered into in good faith with one who did not know of his incapacity, it can not be said such persons are incapable of being partners.[46] Contracts made by an insane partner in the firm name are voidable.[47] In England it seems that an existing partnership is not

C. 607, 63 L. J. Q. B. 802, 11 R. 60, 71 L. T. 587, 43 W. R. 129; Ex parte Jones, 18 Ch. Div. 122; Ex parte Henderson, 4 Ves. 163.

[43] Ex parte Watson, 16 Ves. 265; Ex parte Bates, 2 M. D. & D. 337.

[44] Menkins v. Lightner, 18 Ill. 282; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Behrens v. McKenzie, 23 Iowa 333, 92 Am. Dec. 428 (none of which are partnership cases).

[45] Lindley Partnership (8th ed.), p. 93.

[46] Lindley Partnership (8th ed.), p. 93. The weight of authority holds that an insane person who has been judicially adjudged insane and for whom a guardian or commitee has been appointed, can not make a contract, and a contract which he may assume to make is void. Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. 84; Coburn v. Raymond, 76 Conn. 484, 57 Atl. 116, 100 Am. St. 1000; Woolley v. Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. 22; Ratliff v. Baltzer, 13 Idaho 152, 89 Pac. 71; Mead v. Stegall, 77 Ill. App. 679; Burnham v. Kidwell, 113 Ill. 425; Studabaker v. Faylor, 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Aetna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481; Downham v. Holloway, 158 Ind. 626, 64 N. E. 82, 92 Am. St. 330; Allen v. Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Willis v. Mason, 140 Ky. 88, 130 S. W. 964; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blakeley v. Blakeley, 33 N. J. Eq. 502; Ipock v. Atlantic &c. R. Co., 158 N. Car. 445, 74 S. E. 352. See §§ 367, 369, 378, Elliott Contracts.

[47] If there has been an adjudication of insanity and no guardian has been appointed, it seems a contract of the insane person is only voidable. McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610, or if the guardianship has

dissolved merely because a partner has become a lunatic, and such partner is entitled to share profits subsequently made.[48] And if a member of a going partnership becomes an imbecile, yet he is responsible for the subsequent misconduct of the other partners.[49] In this country there is some diversity of opinion as to whether insanity of a partner terminates the relation.[50] The better rule seems to be that, "the insanity of a partner does not per se work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution."[51]

It has been held that neither a sane partner, nor the committee of an insane partner, nor both together, have power, without authority of court, to continue the partnership business.[52] Nor can the administrator of an interdict, without decree of court, bind the interdict by an agreement to pay his partner a certain sum in settlement of the partnership business.[53]

§ 190. **Married women.**—At common law the contracts of a feme covert were void,[54] therefore she could not become the member of a partnership[55] except perhaps in those instances where she could contract as a feme sole, as in reference to her

been abandoned, Willworth v. Leonard, 156 Mass. 277, 31 N. E. 299; Topeka Water &c. Co. v. Root, 56 Kans. 187, 42 Pac. 715; Wager v. Wagoner, 53 Nebr. 511, 73 N. W. 937; Kimball v. Bumgardner, 16 Ohio Cir. Ct. 587, 9 Ohio C. D. 409; Grimes v. Shaw, 2 Tex. Civ. App. 20, 21 S. W. 718; Thorpe v. Hanscon, 64 Minn. 201, 66 N. W. 1. Contra: Kiehne v. Wessells, 53 Mo. App. 667. A deed given by an insane member of a partnership in the name of the firm is voidable. Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; Beasley v. Beasley, 180 Ill. 163, 54 N. E. 187. See Elliott Contracts, § 367.

[48] Jones v. Noy, 2 M. & K. 125, 3 L. J. Ch. 14.

[49] Sadler v. Lee, 6 Beav. 324, 12 L. J. Ch. 407, 7 Jur. 476.

[50] See post § 583.

[51] Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112.

[52] Kent v. West, 53 N. Y. S. 244, 33 App. Div. 112 (appeal dismissed, 57 N. E. 1114, 163 N. Y. 589).

[53] Espinola v. Blaseo, 15 La. Ann. 426.

[54] See Elliott Contracts, ch. 13, Married Women.

[55] Brown v. Jewett, 18 N. H. 230; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

separate estate, or where her husband was an alien enemy.[56] However, she was permitted by the custom of London to do business as a sole trader,[57] but this custom seems not to have existed in this country,[58] except in the state of South Carolina.[59] The rule in equity is that, at least with the consent of her husband, she may act as a sole trader with reference to her equitable separate estate to the extent that she has power over it.[60] In a great many states, perhaps in most of them, by statute a married woman is authorized to carry on business as a sole trader in respect to her own property, free from the control or claims of her husband or his creditors, and in these states she has substantially the privileges of a feme sole, with the corresponding rights and liabilities. In some states, she has such power only under special circumstances, as where she is abandoned or deserted by her husband, or is living separate and apart from him, or where he fails to support her, through drunkenness, profligacy, or other cause.[61] The disabilities of coverture have, in the main, been removed, and where this is true married women may form a copartnership with persons other than their husbands.[62] In Eng-

[56] Elliott Contracts, ch. 13, Married Women.

[57] 2 Bishop Married Women, § 528; Petty v. Anderson, 2 Car. & P. 38, 12 E. C. L. 437, 3 Bing. 170. See also Beard v. Webb, 2 Bos. & Pul. 93.

[58] Jacobs v. Featherstone, 6 Watts & S. (Pa.) 346; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

[59] 15 Am. & Eng. Encyc. Law 795 and cases cited.

[60] Partridge v. Stocker, 36 Vt. 108, 84 Am. Dec. 664; Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

[61] Carse v. Reticker, 95 Iowa 25, 63 N. W. 461, 58 Am. St. 421; Tillman v. Shackleton, 15 Mich. 447, 93 Am. Dec. 198; Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; Nash v. Mitchell, 71 N. Y. 199, 3 Abb. N. Cas. 171, 27 Am. Rep. 38.

[62] Abbott v. Jackson, 43 Ark. 212; note 84 Am. Dec. 673; Conant v. National State Bank, 121 Ind. 323, 22 N. E. 250; Deere &c. Co. v. Bonne, 108 Iowa 281, 79 N. W. 59, 75 Am. St. 254; Dupuy v. Sheak, 57 Iowa 361, 10 N. W. 731; Plumer v. Lord, 5 Allen (Mass.) 460; Vail v. Winterstein, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. 334; Newman v. Morris, 52 Miss. 402; Merritt v. Day, 38 N. J. L. 32, 20 Am. Rep. 362; Zimmermann v. Erhard, 8 Daly (N. Y.) 311, 58 How. Pr. 11 (affd. 83 N. Y. 74, 60 How. Pr. 163, 38 Am. Rep. 396); Little v. Hazlett, 197 Pa. 591, 47 Atl. 855; notes 31 Am. St. 934, 34 Am. St. 339.

land a married woman may be a partner.[63] Where her disability to contract has not been removed a married woman can not be a partner,[64] at least so as to subject her separate estate to partnership obligations.[65]

§ 191. **Husband and wife.**—At common law husband and wife could not contract with each other, and of course could not enter into a partnership together.[66] Under the modern statutes which authorize contracts between husband and wife, where the disabilities of married women have been entirely removed, a married woman may become a partner in business with her husband.[67] A provision of the statutes that prevents a married woman from becoming surety does not prohibit her from becoming a partner with her husband if such agreement is not entered into merely for the purpose of rendering her liable for her husband's debts.[68] The disabilities of coverture may not be entirely removed, consequently in some jurisdictions it is held that she can not enter into a partnership agreement with her husband,[69]

[63] Lindley Partnership (8th ed.), p. 95; Married Woman's Property Act (1893), 56 and 57 Vict., ch. 63.

[64] Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790.

[65] De Graum v. Jones, 23 Fla. 83, 6 So. 925; Brown v. Jewett, 18 N. H. 230; Knott v. Knott, 6 Ore. 142; Hagan v. Hoover, 33 S. Car. 219, 11 S. E. 725; Frank v. Anderson 13 Lea (Tenn.) 695; Purdom v. Boyd, 82 Tex. 130, 17 S. W. 606; Miller v. Marx, 65 Tex. 131.

[66] In re Kinkead, Fed. Cas. No. 7824, 3 Biss. (U. S.) 405; Belser v. Tuscumbia Banking Co., 105 Ala. 514, 17 So. 40; Hoaglin v. Henderson, 119 Iowa 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. 335; Montgomery v. Sprankle, 31 Ind. 113; In re Boyle's Estate, Tuck. (N. Y.) 4; Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654.

[67] Bernard &c. Mfg. Co. v. Packard, 64 Fed. 309, 12 C. C. A. 123 (construing Pa. law); Schlapback v. Long, 90 Ala. 525, 8 So. 113; Burney v. Savannah Grocery Company, 98 Ga. 711, 25 S. E. 915, 58 Am. St. 342; Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591; Dressel v. Lonsdale, 46 Ill. App. 454; Hoaglin v. Henderson, 119 Iowa 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. 335; Louisville &c. R. Co. v. Alexander, 16 Ky. L. 306, 27 S. W. 981; Jones v. Jones, 99 Miss. 600, 55 So. 361; Dunifer v. Jecko, 87 Mo. 282; Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593n; Zimmerman v. Erhard, 83 N. Y. 74, 60 How. Pr. 163, 38 Am. Rep. 396; Snell v. Stone, 23 Ore. 327, 31 Pac. 663; Lane v. Bishop, 65 Vt. 575, 27 Atl. 499.

[68] Butler v. Frank, 7 Ga. App. 655, 67 S. E. 884.

[69] Gilkerson-Sloss Commission Co.

and that express statutory authority is necessary to create a valid partnership between husband and wife.[70] This rule, prevailing in some jurisdictions, that contracts between husband and wife are void between the spouses, or their transferees, prevents husband and wife from entering into a partnership agreement inter se.[71] One text-writer has thus commented on the holdings:[72] "And this appears to be the better doctrine. It may indeed seem a little odd that a married woman may become a partner of another woman's husband, but not of her own husband, but such is the wise policy of the law. The partnership relation is essentially a commercial and business relation, involving questions of conflicting opinions, settlement of accounts, dissolution, possible litigation, etc., and it would seem that the domestic happiness of husband and wife might be endangered by the raising of such questions between them. Business relations of this sort between husband and wife should therefore be discouraged."

The tendency of modern legislation, however, being not only increasingly toward giving married women equal rights with unmarried women, but also toward giving them in all respects equal rights with men, and also to reduce the disabilities which often served merely as a privilege from liability and not as an actual hindrance from taking part in business, it seems that the rule will become more widespread, perhaps even of general application, that a married woman may make a valid contract of partnership with her husband.

v. Salinger, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. 105; Mayer v. Soyster, 30 Md. 402; Bowker v. Bradford, 140 Mass. 521, 5 N. E. 480; Board of Trade v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. 919; Fuller v. McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

[70] Norwood v. Francis, 25 App. Cas. (D. C.) 463, 4 Ann. Cas. 865 and note; Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; Haggett v. Hurley, 91 Maine 542, 40 Atl. 561, 41 L. R. A. 362; Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907, 2 L. R. A. 343, 16 Am. St. 572. See 25 Am. & Eng. Encyc. Law 379 and notes, 2 L. R. A. 343, 16 L. R. A. 530, 31 Am. St. 935, 4 Ann. Cas. 869; Gwynn v. Gwynn, 27 S. Car. 525, 4 S. E. 229; Wallace v. Finberg, 46 Tex. 35.

[71] Voss v. Sylvester, 203 Mass. 233, 89 N. E. 241.

[72] Long Domestic Relations (2d ed.), § 161.

§ 192. Partnership as a partner.—One firm of partners may form a partnership agreement with another firm. In other words two or more partnerships may form a partnership.[73] As said in one case, there is "no legal difficulty in the way of treating two firms as individual partners in a conjoint firm, if such be obviously the intention of the parties."[74] The Uniform Partnership Act permits a partnership to enter into a partnership as a partner.[75] Under such an arrangement the partnership shares as a partner in profits or assets, and then its share is subdivided among its members. As to third persons, all the individuals are liable as partners.[76] The nature of a subpartnership which does not make the subpartner a member of the firm, has been already discussed.[77]

§ 193. Corporation — General rule as to capacity.—As a general rule, corporations can not enter into a partnership[78] either with individuals[79] or other corporations.[80] Ordinarily a contract is considered as ultra vires[81] where by it a

[73] In re Hamilton, 1 Fed. 800; Mayrant v. Marston, 67 Ala. 453; Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Butler v. American Toy Co., 46 Conn. 136; Wilson v. Morse, 117 Iowa 581, 91 N. W. 823; Meador v. Hughes, 14 Bush (Ky.) 652; Simonton v. McLain, 37 La. Ann. 663; Gage v. Rollins, 10 Metc. (Mass.) 348; Raymond v. Putnam, 44 N. H. 160; Gulick v. Gulick, 14 N. J. L. 578; Willey v. Renner, 8 N. Mex. 641, 45 Pac. 1132; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812.

[74] In re Hamilton, 1 Fed. 800.

[75] Uniform Partnership Act, § 2, cl. 3; § 6, cl. 1.

[76] Meyer v. Krohm, 114 Ill. 574, 2 N. E. 495.

[77] See ante § 149; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Nirdlinger v. Bernheimer, 133 N. Y. 45, 30 N. E. 561; Rockafellow v. Miller, 107 N. Y. 507, 14 N. E. 433, 12 N. Y. St. 295; Burnett v. Snyder, 81 N. Y. 550, 37 Am. Rep. 527; Setzer v. Beale, 19 W. Va. 274.

[78] Davis v. Savannah Lumber Co., 11 Ga. App. 610, 75 S. E. 986; Williams v. Johnson, 208 Mass. 544, 95 N. E. 90.

[79] Franz v. William Barr Dry Goods Co., 132 Mo. App. 8, 111 S. W. 636.

[80] Stephens v. Gall, 179 Fed. 938.

[81] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Stephens v. Gall, 179 Fed. 938; Fechteler v. Palm Bros., 133 Fed. 462, 66 C. C. A. 336; Central R. & B. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Ledsinger v. Central Line Steamers, 75 Ga. 567; Gunn v. Central R. Co., 74 Ga. 509; Marine Bank v. Ogden, 29 Ill. 248; Mestier v. Chevalier Paving Co., 108 La. Ann. 562, 32 So. 520; Conkling v. Washington University, 2

corporation seeks to enter into a partnership with either another corporation or a natural person. This power must be expressly given to corporations.[82] It is a violation of law for them to enter into partnerships,[83] unless they are expressly authorized to do so

Md. Ch. 497; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Hanson v. Paige, 3 Gray (Mass.) 239; French v. Donohue, 29 Minn. 111, 12 N. W. 354; Franz v. Barr Dry Goods Co., 132 Mo. App. 8, 111 S. W. 636; Aurora Bank v. Oliver, 62 Mo. App. 390; Burke v. Concord R. Co., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552; Van Kuren v. Trenton L. & M. Mfg. Co., 13 N. J. Eq. 302; New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; People v. North River &c. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. 843; Bissell v. Michigan &c. R. Co., 22 N. Y. 258; Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; Boyd v. American Carbon Blank Co., 182 Pa. St. 206, 37 Atl. 937; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159; Mallory v. Hananer Oil Works, 86 Tenn. 598, 88 S. W. 396; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837; Lamoille Val. R. Co. v. Bixby, 55 Vt. 235. "It is familiar law that a corporation can not enter into a partnership." Williams v. Johnson, 208 Mass. 544, 95 N. E. 90. See, however, Catskill Bank v. Gray, 14 Barb. (N. Y.) 471.

[82] Fechteler v. Palm Bros., 133 Fed. 462, 66 C. C. A. 336; Butler v. American Toy Co., 46 Conn. 136; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837. It can only exist by virtue of an express grant of power or from necessary implication from such a grant, so that it may be said that it must be expressly given in any event. Indeed, it is so inconsistent with the ordinary powers and duties of such bodies that it could very seldom, if ever, arise from mere implication in any sense.

[83] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Central R. &c. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353n; South Carolina &c. R. Co. v. Augusta &c. R. Co., 107 Ga. 164, 33 S. E. 36; Ledsinger v. Central Line Steamers, 75 Ga. 567; Gunn v. Central R. Co., 74 Ga. 509; Chicago &c. R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861; 35 L. R. A. 599; Bishop v. American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. 317; Marine Bank v. Ogden, 29 Ill. 248; Mestier v. Chevalier Pavement Co., 108 La. 562, 32 So. 520; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; Franz v. Barr Dry Goods Co., 132 Mo. App. 8, 111 S. W. 686; Aurora State Bank v. Oliver, 62 Mo. App. 390; Burke v. Concord R. Co., 61 N. H. 160, 8 Am. & Eng. R. Cas. 552; People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33n, 18 Am. St. 843, 22 Abb. N. Cas. (N. Y.) 164, 3 N. Y. S. 401, 16 Civ. Proc. (N. Y.) 1; New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; State v. Standard Oil

by statute.[84] Express power must be conferred.

Statutes which empower corporations to enter into contracts essential to the transaction of their ordinary business, do not confer upon them the power to enter into contracts of partnership.[85] As a general rule corporations can not be made liable as members of partnerships.[86] Generally they have no power to enter into partnership either with individuals or other corporations; neither, as a rule, can they enter into an agreement which may create a partnership.[87] A purchase by a corporation of an interest in a partnership, was held not to constitute it a partner, as a corporation has no power to enter into partnership.[88] It can scarcely be imagined that such a power would be expressed, and it is clear that none would be implied, where it was in no way necessary for the conduct of the corporate business; as such an arrangement would not only prevent the management of the corporation by its responsible officers, but would defeat the policy of the state regarding corporations.[89] The rule is especially applicable and applied with the severest strictness where the proposed partnership contemplates an enterprise clearly outside of the corporate purposes.[90] Corporations can not enter into valid partnership agreements; and it has been said that such agreements made by a corporation, even with the assent of all the

Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; Bank v. Standard Wagon Co., 65 Ohio St. 559, 63 N. E. 1124; Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714; Merchants' Nat. Bank v. Standard Wagon Co., 6 Ohio N. P. 264; Boyd v. American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937; Mallory v. Hananer Oil Works, 86 Tenn. 598, 8 S. W. 396; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837; Charlton v. Newcastle &c. R. Co., 5 Jur. (N. S.) 1096, 7 Wkly. Rep. 731.

[84] Fechteler v. Palm Bros., 133 Fed. 462, 66 C. C. A. 336; Butler v. American Toy Co., 46 Conn. 136; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837.

[85] Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837.

[86] Aurora State Bank v. Oliver, 62 Mo. App. 390.

[87] Insurance Policies, In re 7 Pa. Dist. 17, 20 Pa. Co. Ct. 284; Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24.

[88] Aurora State Bank v. Oliver, 62 Mo. App. 390.

[89] Oscillating Carousal Co. v. McCool (N. J. Eq.), 35 Atl. 585.

[90] Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681. See Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

stockholders, may be annulled by the state. But a person contracting with such a partnership with knowledge of the corporate powers has been held to have dealt with the corporation and its pretended partner as joint owners of the property.[91] Several corporations engaged in manufacturing cotton-seed oil, were held to have no power to enter into a contract of partnership, by which the several properties and machinery were to be turned over to a committee selected by such corporations, and to be managed and operated by the committee for the common benefit, the profits and losses to be shared in agreed proportions.[92] The fact that one corporation owns the greater part of the stock of another corporation, and the same person is president of both corporations, does not make them partners.[93] Neither is the partnership relation created by the lease of the business and property of a corporation for a term of years for a rental equal to a fourth of the net profits.[94]

§ 194. Theory that corporations may enter into partnership—Uniform Partnership Act.—Under the Uniform Partnership Act, a corporation may be a partner.[95] There are also cases which lay down the rule that a corporation may, under certain circumstances be justified in entering into a partnership arrangement for the purpose of better conserving its objects and for the protection of its property.[96] And in California a corporation was held to have the power to enter into a contract with an individual to engage in a certain venture, profits and losses to be divided equally between them, where the entire management

[91] Huguenot Mills v. Jempson, 63 S. Car. 363, 47 S. E. 687, 102 Am. St. 673.

[92] Mallory v. Hananer Oil-Works, 86 Tenn. 598, 8 S. W. 396.

[93] Southern Pac. R. Co. v. Meadors, 104 Tex. 469, 140 S. W. 427.

[94] McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 130 Pac. 165.

[95] Uniform Partnership Act, § 2, cl. 3; § 6, cl. 1. But this may not give every corporation power to enter into a particular partnership.

[96] In re Hamilton, 1 Fed. 800. See generally, Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Raymond v. Putnam, 44 N. H. 160; Smith v. Wright, 5 Sandf. (N. Y.) 113; In re Warner, 7 Nat. Bank Reg. 47; Mullins v. Miller, 1 Lower Can. J. 121; Mallon v. Craig, 3 Ont. 541.

of the enterprise was entrusted to the corporation.[97] So, notwithstanding the strict rules that generally obtain, it was held by the Supreme Court of Alabama that where a railroad and banking company, chartered for such purposes, in excess of its corporate purposes and in violation of its charter, entered into a partnership with an individual to operate a steamboat, it was liable to an injured passenger, on the theory that an exemption from liability in such a case would be a license to corporations to do wrong to others, and that while it exceeded its charter powers, its duties and responsibilities to a passenger were the same as if the business had been authorized and legal.[98] But the Supreme Court of Georgia, in an action by an injured passenger on the same steamboat and against the same defendant, held that there could be no recovery for the reason that the corporation had no power to form the partnership.[99] An arrangement by which a railroad company operated steamboats in connection with its line was upheld by the same court.[1] But an agreement between steamboat lines to pool their earnings and after payment of all expenses to divide the net earnings in certain proportions, has been held not to create a partnership.[2] The creditors of an insolvent firm, one of the members being a corporation, formed a partnership for the purpose of taking the insolvent stock and property and disposing of it to the best advantage. In an action by one of the partners for an accounting it was held that the fact that the corporation had no power to become a member of an ordinary partnership, did not render the particular arrangement so illegal as to warrant a dismissal of the bill.[3]

Sometimes the power of a corporation to enter into a partnership may not be raised or questioned by a defendant in an action where the corporation could properly be joined with an indi-

[97] **Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855. See Allen v. Woonsocket Co., 11 R. I. 288.**

[98] **Central R. &c. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353n.**

[99] **Gunn v. Central R. Co., 74 Ga. 509.**

[1] Graham v. Macon &c. R. Co., 120 Ga. 757, 49 S. E. 75.

[2] White Star Line v. Star Line &c., 141 Mich. 604, 105 N. W. 135, 113 Am. St. 551.

[3] Kelly v. Biddle, 180 Mass. 147, 61 N. E. 821.

vidual or another corporation.[4] A corporation can not be held liable as a partner, in the absence of allegations or proof of charter powers on its part to enter into such relation.[5] An agreement between a corporation and an individual that the latter should become the manager of an opera house and receive for his services a certain sum per week, and a percentage of the profits at the end of the season, and requiring him to pay one-half of the yearly rental, and a bonus of a certain sum to the corporation, and reserving the right to remove him if his services were unsatisfactory, was held not sufficient to create a partnership, and gave the individual no power to control or share in the transactions of the corporation.[6] Transactions between two corporations having the same managing officers were held not to constitute such corporation's partners.[7]

§ 195. Corporation held liable as a partner.—The corporation may, in a proper case, be held liable as if it were a partner, where necessary to prevent injustice,[8] or, it seems, the corporation itself be permitted to recover on a partnership agreement.[9] Some cases have upheld such contract relations where it was to the best interest of the corporation, and on the other hand contracts thus entered into have been enforced, in some instances even where the partnership agreement was not upheld but where it was necessary to prevent injustice.[10]

[4] French v. Donohue, 29 Minn. 111, 12 N. W. 354.

[5] White v. Pecos Land & Water Co., 18 Tex. Civ. App. 634, 45 S. W. 207.

[6] Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.), 75 S. W. 74, 317 (revd. 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302).

[7] Paris Mercantile Co. v. Hunter, 74 Ark. 615, 86 S. W. 808.

[8] Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556; French v. Donohue, 29 Minn. 111, 12 N. W. 354; Johnson v. Weed &c. Mfg. Co., 103 Wis. 291, 79 N. W. 236. See also Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. 467; Manhattan Brass &c. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Allen v. Woonsocket Co., 11 R. I. 288.

[9] Cameron v. First Nat. Bank (Tex.), 34 S. W. 178. See also Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327; Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249.

[10] Butler v. American Toy Co., 46 Conn. 136; Marine Bank v. Ogden, 29

The law sometimes imposes on a corporation a partnership liability. A corporation may, in furtherance of the object of its creation, contract with an individual, though the effect of the contract may be to impose upon it the liability of a partner. It seems that as to third persons this liability as a partner is frequently imposed, though it was not the intention of the corporation to become one. and even though a partnership could not have been formed.[11] The rule preventing a corporation from entering into a contract of partnership, does not prevent the law from imposing on a corporation the liability of a partner as to third persons under a contract made by it in furtherance of the objects of its creation.[12] So, a contract made by a corporation in a partnership relation which was not illegal will bind it where third persons have been induced to expend money on the faith of such contract.[13] While a corporation can not legally enter into a partnership, yet where it had done so it was held that it must account to the other partner who had fully performed all the obligations of his part of the contract.[14]

§ 196. Corporation held liable as partner—Illustrations.—A corporation and an individual having assumed the relation of partners, and transacted business as such, were held to have the right to recover on an obligation made to them in their partnership name, on the theory that they had a joint right of action, and the description of them as partners might be regarded as surplusage.[15] And a corporation and an individual were held entitled to

Ill. 248; Conkling v. Washington University, 2 Md. Ch. 497; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. 467; Kelly v. Biddle, 180 Mass. 147, 61 N. E. 821; New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Manhattan Brass &c. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244; Rider Life Raft Co. v. Roach, 97 N. Y. 378; Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; Allen v. Woonsocket Co., 11 R. I. 288.

[11] Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556.

[12] Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37.

[13] Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37.

[14] Kelly v. Biddle, 180 Mass. 147, 61 N. E. 821.

[15] Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249. See Sabine

share in the earnings of a joint enterprise.[16] So, where a corporation leased its works to an individual for a definite time, and reserved a part of the profits as rent, it was held liable as a partner.[17] While an agreement between railroad companies for the interchange of traffic, with other tickets and other rates, may not constitute a partnership, yet it was assumed in such case that if the agreement was not a partnership, it was sufficient to constitute one company the agent of the other to make contracts.[18] The fact that railroad companies have no power to enter into partnership agreements, was held not to relieve one of the companies from contractual liability to third persons.[19] After a partnership agreement between a corporation and certain individuals has been fully executed, the corporation will not be permitted to repudiate the arrangement and share in the distribution of the firm assets under bankruptcy proceedings.[20] A corporation organized to acquire, develop and sell lands and water-rights, as a more convenient agency for carrying out agreements between the corporators, was held to constitute a partnership, and the entire capital stock of the corporation was treated as partnership assets.[21] While a corporation has no power to enter into contracts of partnership, yet where such a contract has been entered into and executed by the other party equity will compel it to account for what is due him under the contract.[22] And while a corporation may have no power to bind itself as a partner, yet it may bind itself to share in the profits of contracts it is authorized to perform with any one from whom it receives adequate consideration.[23] A contract of a corporation by which it employed a person to manage

Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837; French v. Donohue, 29 Minn. 111, 12 N. W. 354.

[16] Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327.

[17] Catskill Bank v. Gray, 14 Barb. (N. Y.) 471.

[18] Gill v. Manchester &c. R. Co., L. R. 8 Q. B. 186, 42 L. J. Q. B. 89, 28 L. T. 587, 21 W. R. 525.

[19] Harrill v. South Carolina &c. R. Co., 135 N. Car. 601, 47 S. E. 730.

[20] Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129.

[21] Shorb v. Beaudry, 56 Cal. 446.

[22] Boyd v. American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937. See Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714.

[23] Mestier v. Chevalier Pavement Co., 108 La. 562, 33 So. 520.

and conduct and work at the business in which it was engaged, was held not to create a partnership, though such manager was to receive an interest in the profits in addition to a salary.[24] A corporation may be estopped from asserting its want of power to enter into partnership.[25] Thus, a bank doing business with and receiving deposits from a partnership consisting of an individual and a corporation, was held estopped to deny the validity of the partnership.[26] And any person making a contract with or becoming indebted to such a partnership with knowledge, will not be heard to assert such want of power on the part of the corporation.[27] A corporation and an individual were held to have the right to recover upon obligations made to them in their firm name.[28]

§ 197. **Corporation as co-owner not held liable as partner.** —Notwithstanding the rule that prevents a corporation from entering into partnerships, it is not prohibited from becoming a co-owner of property either with an individual or another corporation. A corporation may become a co-owner with an individual or corporation within the scope of its corporate powers.[29] On this theory it was held improper to exclude evidence because it tended to prove that a corporation had made a contract of partnership which it had no power to make, but where such evidence in fact would show that the plaintiff and the corporation were merely co-owners to certain property.[30] In one case cited it was

[24] Belch v. Big Store Co., 46 Wash. 1, 89 Pac. 174.

[25] Cameron v. First Nat. Bank (Tex.), 34 S. W. 178; Johnson v. Weed &c. Mfg. Co., 103 Wis. 291, 79 N. W. 236.

[26] Willey v. Crocker &c. Nat. Bank, 141 Cal. 508, 72 Pac. 832, 75 Pac. 1061.

[27] Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. 249; Kelly v. Biddle, 180 Mass. 147, 61 N. E. 821; In re Ervin, 109 Fed. 135; Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129.

[28] French v. Donohue, 29 Minn. 111, 12 N. W. 354; New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412. See also Huguenot Mills v. Jempson, 68 S. Car. 363, 47 S. E. 687, 102 Am. St. 673.

[29] Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24; Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327.

[30] Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24.

held that a corporation might be a joint owner with an individual of a ferry and that such individual could maintain an action for an accounting.[31] In an early California case it was said that the books did not afford an instance in which the right to hold property as tenants in common, either with another corporation or a natural person, was denied to corporations.[32]

§ 198. Tenants in common as partners.—Tenants in common may be partners in conducting business on the land without affecting the legal status of the land.[33] Where tenants in common of land conducted mining operations on the land, leased part of it for mining, cultivated part of it as farm lands and one listed it for taxation in the name of both and made concessions for a railroad right of way, such acts do not necessarily show a partnership in the land itself, although there may be one in its use.[34]

§ 199. Authority of agent to make his principal a member of a partnership.—Generally, authority to act as agent confers no authority to form a partnership in the name of the principal with a third person.[35] An agent of a minor to manage a plantation and employ laborers, has no authority to form a planting partnership with one of the laborers.[36] An agent appointed to rent land or do whatever he pleased with it, can not bind his principal as a partner in a partnership in the use of the land.[37] An agent having authority to hold in possession, control, sell and assign real estate has no authority to enter into a partnership for his principal.[38] But a principal ratifying the unauthorized acts of his agent in holding him out as a partner, is liable as a partner.[39]

[31] Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327.

[32] De Witt v. San Francisco, 2 Cal. 289.

[33] Holton v. Guinn, 76 Fed. 96; Deyerle v. Hunt, 50 Mo. App. 541.

[34] Holton v. Guinn, 76 Fed. 96.

[35] Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319.

[36] McIntosh v. Kelly, 31 La. Ann. 649.

[37] Providence Machine Co. v. Browning, 72 S. Car. 424, 52 S. E. 117.

[38] Guy v. Rosewater, 18 Colo. App. 1, 69 Pac. 271.

[39] Williams v. Butler, 35 Ill. 544.

§ 200. Partners not qualified to take part in firm business requiring license.—In order to conduct certain professions and businesses persons must be legally qualified or licensed. Examples of such professions are the practice of law, medicine, dentistry and pharmacy. An example of business is pawnbroking. The rule is that a contract made in the course of the trade or profession by an unlicensed person who is following a trade or profession required to be licensed, can not be enforced by such person if the purpose of the law was to protect the public from its own ignorance, and the lack of skill of those who might engage in such calling.[40] Where persons legally qualified or licensed to do a certain business enter into a partnership with one who is not so qualified or licensed the partnership is not illegal, if the legally qualified persons are to conduct the business.[41] This phase of the subject is more important in England than in this country.[42] Where one of two attorneys composing a firm was unlicensed, it was held the firm could not recover on a contract.[43] The same rule was applied where one member of a firm of attorneys failed to pay a license tax required by law.[44] The general rule is that license to one member of a partnership to sell intoxicating liquors, does not authorize his copartners to make sales.[45]

[40] Elliott Contracts, § 267; Levison v. Boas, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575 and note.

[41] Harland v. Lilienthal, 53 N. Y. 438; Arden v. Tucker, 4 Barn. & Ad. 815; Turner v. Reynall, 14 C. B. (N. S.) 328.

[42] See Lindley Partnership (8th ed.), pp. 115, 126.

[43] Hittson v. Browne, 3 Colo. 304.

[44] McIver v. Clarke, 69 Miss. 408, 10 So. 581. Contra: Harland v. Lilienthal, 53 N. Y. 438; Arden v. Tucker, 4 Barn. & Ad. 815. See Schnaier v. Navarre Hotel &c. Co., 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. 790, where court said that if one of firm of plumbers was licensed there could be recovery for services except where statute required all to be licensed (dictum).

[45] Long v. State, 27 Ala. 32; Shaw v. State, 56 Ind. 188; State v. McConnell, 90 Iowa 197, 57 N. W. 707; Lovejoy v. Commonwealth, 13 Ky. L. 976; Commonwealth v. Hall, 8 Grat. (Va.) 588; Plisson v. Skinner, 5 Terr. L. R. 391. See, however, Barnes v. Commonwealth, 2 Dana (Ky.) 388, where sales by the unlicensed partner for the joint benefit of himself and the licensee were allowed, and Webber v. Williams, 36 Maine 512, which allows him to sell under the licensed partner's direction. See also Garrett-Williams Co. v. Watkins, 84 Vt. 299, 79 Atl. 387, Ann. Cas. 1913 A, 846n.

§ 201. Delectus personarum—Choice of partners.—Partnership being a relation of trust, confidence and mutual agency, it follows that it must be founded on contract and that no person can become a partner except by the consent of all the others. This is true at the formation of the relation, and thereafter, and one partner at no time can introduce a third person into the firm without the consent of all the others.[46] The Uniform Partnership Act provides that "No person can become a member of a partnership without the consent of all the partners."[46a] So jealously does the law guard this right of delectus personarum that the attempt to transfer the right of one partner without the other's consent terminates the partnership.[47] If one partner attempts to transfer his interest without the consent of the others, all that the transferee obtains is the right to a settlement of the partnerships, not a right to take part in the going business.[48] A partner can not even by his will leave to a devisee or executor the right to enter into and carry on the partnership business as a partner.[49] There is an apparent exception to the rule under discussion, though not really one. Consent to the admission into the going firm of a new partner or of an assignee or personal representative after the death of a partner may be given in the original partnership agreement.[50] And acceptance of a partner's assignee may sometimes

[46] Story Partnership, § 5; Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. 225; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Freligh v. Miller, 16 La. Ann. 418; Gray v. Gibson, 6 Mich. 306; Freeman v. Bloomfield, 43 Mo. 391; Filley v. Walker, 28 Nebr. 506, 44 N. W. 737; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525.

[46a] Uniform Partnership Act, § 18 (g).

[47] See § 591 and ch. 18 on change of membership.

[48] Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Kingman v. Spurr, 7 Pick. (Mass.) 235; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522 (revd. 20 Johns. 611); Moddewell v. Keever, 8 Watts & S. (Pa.) 63; Carter v. Rolard, 53 Tex. 540. See § 591 infra (on dissolution).

[49] Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Pearce v. Chamberlain, 2 Ves. 33; Fox v. Hanbury, Cowp. 445.

[50] Meaher v. Cox, 37 Ala. 201; Rosenstiel v. Gray, 112 Ill. 282; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Ex parte Garland, 10 Ves. 110.

be inferred from silence or failure to dissent.[51] In the case of mining partnerships[52] and joint stock companies[53] there is no delectus personarum, but the assignee or transferee of a member of the association acquires his interest.

[51] Jones v. O'Farrel, 1 Nev. 354.
[52] See § 152 ante.
[53] See ch. 32 infra.

CHAPTER VIII

PARTNERSHIP AGREEMENT—CREATION AND DURATION OF RELATION

SECTION

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§ 210. How relation is formed.—A partnership is created by a voluntary agreement of the parties express or implied.[1] In order to constitute a partnership contract all the essentials of any other contract, as to competent parties, consideration, subject-

[1] Dunham v. Loverock, 158 Pa. 197, 27 Atl. 990, 38 Am. St. 838; Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319, rehearing denied Id. 689; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n. See also Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Briggs v. James H. Rice Co., 83 Ill. App. 618; Jones v. Stever, 154 Mo. App. 640, 136 S. W. 16; Simmons v. Ingram, 78 Mo. App. 603; Martin v. Baird, 175 Pa. St. 540, 34 Atl. 809; Causler v. Wharton, 62 Ala. 358; Haycock v. Williams, 54 Ark. 384, 16 S. W. 3; Morgan v. Farrell, 58 Conn. 413, 20 Atl. 614, 18 Am. St. 282; Bushnell v. Consolidated Ice M. Co., 138 Ill. 67, 27 N. E. 596; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Halliday v. Bridewell, 36 La. Ann. 238; Ingals v. Ferguson, 59 Mo. App. 299; Groves v. Tallman, 8 Nev. 178; Wilson's Exrs. v. Cobb's Exrs., 28 N. J. Eq. 177; Dawson v. Pogue, 18 Ore. 94, 22 Pac. 637, 6 L. R. A. 176; In re Gibb's Es-

matter and meeting of the minds of the parties, must appear.[2] It never is formed by operation of law.[3] The so-called partnership by estoppel is not an exception to this rule. A true partnership inter se is not formed by estoppel, but persons who have been held out as partners may be liable to third persons as if they were partners. Thus the relation of father and son,[4] husband and wife,[5] attorney and client,[6] or the joint prosecution of a law suit,[7] does not give rise to a partnership relation between such parties, in the absence of any agreement to that effect. One can not be made a member of a partnership without his consent, express or implied.[8]

§ 211. **Articles of partnership.**—The better and probably the customary method of forming a partnership is by a written agreement as to the terms and conditions of the partnership, signed by the parties. Such formal written instruments are called articles of partnership. By these articles the parties to a certain extent fix their rights, duties and liabilities, and provide for the commencement, duration and termination of the relation. It is better in forming a partnership that such articles be drawn up and the rights of the parties fixed by them as definitely as possible and many opportunities for controversy thus removed, though formal articles are not essential to the creation of the

tate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; Cocke v. Evans' Heirs, 9 Yerg. (Tenn.) 287; Setzer v. Beale, 19 W. Va. 274; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

[2] Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319, rehearing denied Id. 609.

[3] Bushnell v. Consolidated Ice Mach. Co., 138 Ill. 67, 27 N. E. 596; Bishop v. Georgeson, 60 Ill. 484; Phillips v. Phillips, 49 Ill. 437; Metcalf v. Redmon, 43 Ill. 264; Freeman v. Bloomfield, 43 Mo. 391; Ingals v. Ferguson, 59 Mo. App. 299; Wilson's Exrs. v. Cobb's Exrs., 28 N. J. Eq. 177; Central City Sav. Bank v. Walker, 66 N. Y. 424; Heye v. Tilford, 2 App. Div. (N. Y.) 346, 73 N. Y. St. 428, 37 N. Y. S. 751; Butler Sav. Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163, 39 Am. St. 665; Dunham v. Loverock, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. 838; In re Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; In re Hedge's Appeal, 63 Pa. St. 273.

[4] Phillips v. Phillips, 49 Ill. 437.

[5] Ingals v. Ferguson, 59 Mo. App. 299.

[6] Willis v. Crawford, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

[7] Wilson's Exrs. v. Cobb's Exrs., 28 N. J. Eq. 177.

[8] Coolidge v. Taylor, 85 Vt. 39, 80 Atl. 1038.

relation. Where each party is to give his entire time, contribute equally to capital and share equally in profits and losses, a brief memorandum may be sufficient. But if they contribute unequally, are to share unequally in profits, if some are to receive compensation for services or interest, or the rights of some are restricted as between themselves, then full articles are desirable. Generally, articles of partnership should state the nature and place of business and the firm name; the time of beginning and the duration of the partnership; the contribution of each to the capital of the firm; the share of each in profits and losses; the powers of each partner in the conduct of the business; and provide for its dissolution and winding up. In special cases many other matters are included. The ordinary rules of construction of contracts apply to the construction of articles of partnership, and that subject will be discussed in a later chapter.[9] Partnership articles are not intended to define all the rights and duties of the partners inter se, but many of these must be determined by the general rules of law. Some suggestive forms of articles of partnership will be found in the chapter on forms.

§ 212. Verbal contract.—It is not essential to the existence of a partnership that the agreement of the parties creating the relation should be in writing,[10] for an oral partnership agreement is ordinarily as binding as a written one.[11] Naturally, a parol agreement for a partnership to last more than a year is invalid, under the Statute of Frauds.[12] But where immediately after making the contract the parties begin to perform it, they have

[9] See post § 386.

[10] Simmons v. Ingram, 78 Mo. App. 603; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n; 1 Lindley Partnership, p. 80; 1 Bates Partnership, § 281; Levi v. Karrich, 13 Iowa 344; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994. See § 218, on verbal agreement to create partnership for sale of real estate. See also Ruggles v. Buckley, 153 Fed. 950, 86 C. C. A. 154; Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354.

[11] Weinstein v. Welden, 80 Misc. 348, 142 N. Y. S. 406.

[12] Wilson v. Ray, 13 Ind. 1; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623.

created a partnership at will, under which the rights of the parties are determined by the terms of agreement except as to the time of termination, for it may be terminated by either party at any time.[13] If the parol contract is for an undertaking which may be performed within the year it is absolutely binding, and neither party has the right to dissolve at will without being liable to the other in damages.[14]

§ 213. **Implied contract.**—The agreement may be either express or implied.[15] The actual intent of the parties usually governs.[16] However, the relation is implied as between the parties to the contract and as to liability to third parties, in cases where they have had a community of interest in property and have shared profits and losses, and have acted as partners, whether or not they really intended eo nomine to become partners.[17] The application of the rule of a partnership, or partnership liability, created by implied contract, is perhaps most frequent, and is best illustrated in case of persons who assumed to be incorporated but did not form even a de facto corporation.[18] Generally, where there is an agreement to place money, effects, labor and skill or some or all of them, in a lawful business and divide the profits

[13] Sanger v. French, 157 N. Y. 213, 51 N. E. 979; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Jordan v. Miller, 75 Va. 442; Treat v. Hiles, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858; Mackay v. Rutherford, 13 Jur. 21, 6 Moore P. C. 413, 13 Jur. 21, 13 Eng. Reprint 743.

[14] Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336.

[15] Savannah Rail &c. Co. v. Sabel, 145 Ala. 681, 40 So. 88; Plunkett v. Dillon, 4 Houst. (Del.) 338; Bowen v. Rutherford, 60 Ill. 41, 14 Am. Rep. 25; Phillips v. Phillips, 49 Ill. 437; Halliday v. Bridewell, 36 La. Ann. 238; Central City Sav. Bank v. Walker, 66 N. Y. 424; Chase v. Barrett, 4 Paige (N. Y.) 148; Sargent v. Collins, 3 Nev. 260; Dunham v. Loverock, 158 Pa. St. 197, 27 Atl. 990, 38 Am. St. 838; In re Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Providence Mach. Co. v. Browning, 72 S. Car. 424, 52 S. E. 117; Holme v. Hammond, L. R. 7 Ex. 218, 41 L. J. Ex. 157, 20 W. R. 747.

[16] See § 89 ante.

[17] 1 Lindley Partnership, p. 84; Jacobs v. Shorey, 48 N. H. 100, 97 Am. Dec. 586; McFarlane v. McFarlane, 82 Hun (N. Y.) 238, 31 N. Y. S. 272, 63 N. Y. St. 589; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593.

[18] Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Central City Sav. Bank v. Walker, 66 N. Y. 424. See § 231 infra.

and bear the losses in certain specified proportions, a partnership is formed.[19]

§ 214. Mutual assent.—Mutual assent of the parties to a partnership agreement is as necessary as in any other contract. To establish the existence of a partnership agreement, it must appear that the parties have assented to all the propositions and conditions included in the agreement sought to be proved.[20] Thus one who seeks to show a partnership between himself and others must show not only his own assent but the assent of each one whom he seeks to hold as a partner and it is not sufficient to show that some of the parties regarded one as a partner who had never assented to that relation.[21] This is the rule if the assent of one partner was induced by "undue influence"[22] or if one party believes himself a partner, the others not having assented.[23] A partnership is not created by an offer unaccepted on terms by the party to whom it was made,[24] or by an acceptance by an unauthorized agent,[25] although an acceptance by such an agent may be ratified.[26]

Thus, if the agreement is so indefinite in important particulars, such as the amount of capital to be contributed, the business to be undertaken or the duties of the partners, that the court can not determine with certainty on what the minds of the parties met, the agreement will not be enforced.[27] In some cases

[19] Nicholson v. Kilbury (Wash.), 145 Pac. 189.

[20] Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084; Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319, 609.

[21] Phillips v. Phillips, 49 Ill. 437; Baher v. Baher, 161 Ill. App. 430; Atwood v. Meredith, 37 Miss. 635; Magovern v. Robertson, 59 Hun 627, 14 N. Y. S. 114, 37 N. Y. St. 441 (aff. 129 N. Y. 636, 29 N. E. 1031). See Halvorson v. Bowes, 22 Manitoba 447; Channel v. Fassitt, 16 Ohio 166.

[22] Faver v. Bowers (Tex. Civ. App.), 33 S. W. 131.

[23] Phillips v. Phillips, 49 Ill. 437; Setzer v. Beale, 19 W. Va. 274.

[24] Metcalf v. Redmon, 43 Ill. 264; Bennett v. Pulliam, 3 Ill. App. 185; Farrow v. Bresler, 108 Mich. 564, 66 N. W. 492; Moscowitz v. Sassulsky, 141 App. Div. 763, 126 N. Y. S. 513.

[25] Miles v. Wann, 27 Minn. 56, 6 N. W. 417.

[26] Williams v. Butler, 35 Ill. 544.

[27] Goldsmith v. Sachs, 17 Fed. 726, 8 Sawy. (U. S.) 110; Savannah Rail &c. Co. v. Sabel, 145 Ala. 681, 40 So. 88; Morris v. Peckham, 51 Conn. 128; Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084; Doan v. Rogan, 79 Ohio St.

the parties may have called themselves partners, but as the agreement to which they assented did not actually create the relation, they are not such in law.[28]

The converse of this proposition is also true, that if the parties did not think they were forming a partnership, or even declare that they are not, but the agreement to which they assented makes them partners in law, then they are liable as partners.[29] It has also been held that lack of knowledge by a client of the effect of a written instrument prepared by his attorney, may prevent it from creating a partnership.[30]

§ 215. **Consideration.**—As in the case of all contracts, there must be a consideration for the contract whereby the partnership relation is formed. This element may, however, be supplied by the mutual promises of the respective parties or their contributions of either property, labor or skill toward the partnership business.[31] Taking part in the business and thus rendering himself liable to third parties as a partner may be a sufficient consideration as to the one who contributes no capital.[32]

It was held that where one of the partners in a sawmill business was required to take all of the orders for lumber and per-

372, 87 N. E. 263; Watson v. Bayliss, 71 Wash. 499, 128 Pac. 1061; In re Vince (1892), 2 Q. B. 478, 61 L. J. Q. B. 836, 67 L. T. Rep. 70.

[28] Gulf City Shingle Mfg. Co. v. Boyles, 129 Ala. 192, 29 So. 800; Oliver v. Gray, 4 Ark. 425; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Halvorson v. Bowes, 22 Manitoba 447.

[29] City Nat. Bank v. Stone, 131 Mich. 588, 92 N. W. 99; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

[30] Bolles v. O'Brien, 59 So. 133, 63 Fla. 342, 354.

[31] McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Holdridge v. McKewen, 107 Ark. 368, 155 S. W. 113; Trayes v. Johns, 11 Colo. App. 219, 52 Pac. 1113; Lane v. Lodge, 139 Ga. 93, 76 S. E. 874; Byrd v. Fox, 8 Mo. 574; Mitchell v. O'Neal, 4 Nev. 504; Emery v. Wilson, 79 N. Y. 78; Coleman v. Eyre, 45 N. Y. 38; Doan v. Rogan, 79 Ohio St. 372, 87 N. E. 263; Breslin v. Brown, 24 Ohio St. 565, 15 Am. Rep. 627; Belcher v. Conner, 1 S. Car. 88; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Kimmins v. Wilson, 8 W. Va. 584; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

[32] Emery v. Wilson, 79 N. Y. 78; Guccione v. Scott, 21 Misc. 410, 47 N. Y. S. 475 (affd. 33 App. Div. 214, 53 N. Y. S. 462).

form the duties involved in filling them, this was a sufficient consideration on his part to make him a partner, though the other partner was to buy all the lumber which the mill produced.[33] To allow the use of one's name is sufficient consideration.[34] But where there is merely the promise of one person that another shall share in the profits of an undertaking, and the other neither furnishes anything nor does anything, the agreement is void.[35] It has been held that no partnership was in fact formed, notwithstanding the parties agreed to purchase a tract of land "in partnership" when one of the parties did nothing on her part, contributed nothing, and risked nothing, since there was no consideration to support the contract.[36]

Where one agreed that another could become his partner in a certain transaction by paying him half the amount of money he had expended, and such person gave him a worthless check which was not accepted as absolute payment, the parties did not become partners, nor was the original venturer bound by a payment made to his alleged partner who had not paid his share.[37] The assumption of liability for debts of the firm may be a consideration for special rights or an increased share in profits to one partner.[38] A surrender of one partner's right to withdraw from the firm and his continuance therein, may be a consideration for the agreement of his copartners that he shall have half the profits and half the net assets on dissolution.[39]

An agreement whereby one is to pay a person established in business a sum of money to admit him into partnership or pre-

[33] Smith v. Padrosa, 139 Ga. 484, 77 S. E. 639.

[34] Breslin v. Brown, 24 Ohio St. 565, 15 Am. Rep. 627; McCord v. Field, 27 U. C. C. P. 391.

[35] Trayes v. Johns, 11 Colo. App. 219, 52 Pac. 1113; Frothingham v. Seymour, 118 Mass. 489; Mitchell v. O'Neale, 4 Nev. 504.

[36] Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822.

[37] Stundon v. Dahlenberg, 184 Mo. App. 381, 171 S. W. 37.

[38] McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530; Lyle v. Howard, 64 S. W. 144, 24 Ky. L. 143; Clift v. Barrow, 108 N. Y. 187, 15 N. E. 327.

[39] Melville v. Kruse, 69 App. Div. 211, 74 N. Y. S. 826 (affd. 174 N. Y. 306, 66 N. E. 965).

mium, is valid and enforcible.[40] If the partnership is terminated sooner than expected, either by fraud or failure of consideration, the ordinary laws of contracts apply, as to the recovery of all or part of the premium.[41] If there is no fraud, but the partnership is terminated by death or otherwise, sooner than expected, it has usually been held that there is no right to a return of the premium unless provided for in the partnership agreement.[42] If the premium was obtained through fraud, it may be recovered by taking the partnership accounts, or rescission of the contract and suit for money paid.[43]

§ 216. Examples of agreements which have been held to constitute a partnership.—In a preceding chapter when considering the tests of partnership, naturally there was a discussion of some agreements which either did or did not constitute a partnership. The discussion here is practically a continuation of the former, except that the examples given are considered with reference to no particular test. Among contracts which have been held to create partnerships are the following: An agreement whereby the owners of unimproved real estate are to give a builder an undivided third interest in the property in consideration of his assistance in the improving and marketing of that property,[44] a written contract which provided that the two parties were "to option coal and timber lands" and secure necessary renewals; one to furnish money to offset the other's services, the profits to be divided equally on sale, less option money, and each to have authority to sell,[45] an association of persons to carry on business for mutual benefit, though their shares are represented by transferable certificates, and though the title to the

[40] Walker v. Harris, 1 Anstr. 245.

[41] Smith v. Everett, 126 Mass. 304; Capen v. Barrows, 1 Gray (Mass.) 376; Tournade v. Hagedorn, 5 Thomp. & C. (N. Y.) 288.

[42] English Partnership Act, § 40; Taylor v. Hare, 1 Bos. & P. (N. S.) 260; Whincup v. Hughes, L. R. 6 C. P. 78; Ferns v. Carr, 28 Ch. Div. 409; Farr v. Pearce, 3 Madd. 74.

[43] Ex parte Turquand, 2 M. D. & D. 339; Bury v. Allen, 1 Coll. 589.

[44] Campbell v. Northwest Eckington Imp. Co., 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. 796.

[45] Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948.

property was taken in the name of a third person as agent,[46] a contract where two persons were to purchase lumber land, each contributing time, money and labor, and dividing equally profits and losses, each having the power to act for the other in employing and paying labor and selling lumber, and each intending to become partners,[47] an agreement between two parties to deal in tax titles as a business, one to furnish the money and the titles to be taken in his name, and he to receive ten per cent. on his investment out of the profits, the remaining profits being equally divided between him and the other party, who managed the business.[48] In one Colorado case it was held that under the circumstances a contribution of money to an adventure for reducing certain mine slag, was not a loan, but a contribution to capital which made him a partner.[49] In California, under the code, it is held that an agreement of two persons to carry on a definite business, and to divide the profits and losses of such business creates a partnership, although one party has the power to veto purchases made by the other.[50]

Two persons who associate themselves together, purchase realty for use in the business, making part payments from the profits and rent and agreeing that the real property shall be part of the partnership assets, are partners under the California code, though one partner has advanced a large sum to make a payment on the real estate.[51] So, in Maryland, where a firm entered into an arrangement with an employé, by which he was to be known as a partner, was authorized to transact the firm's business on the stock exchange, of which he was a member, and could sign checks, and was given a contingent interest in profits, he was held a partner in fact, although he received a regular salary and contributed no capital.[52] And in New York, it was

[46] Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355.

[47] Edwards v. Zuck, 171 Mich. 29, 136 N. W. 1122.

[48] Oriental Realty Co. v. Taylor, 69 Wash. 115, 124 Pac. 489.

[49] Richardson v. Keely (Colo.), 142 Pac. 167.

[50] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[51] Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478.

[52] Hemsley v. McKim, 119 Md. 431, 87 Atl. 506.

held that parties who, as heirs, devisees and legatees owned a ferry franchise, boats and docks, and allowed the ferry business to continue which their ancestors and testators had conducted, and each received a share of the profits each year, were partners.[53] As a general rule where two or more persons enter into a business arrangement under which they have a community interest in the property used in such business, and also in the profits arising therefrom, they are regarded as partners.[54] "Joint ownership of property, use of it in a business, sharing of profits and division of net proceeds upon dissolution, constitute the part owners partners in the business, and liable for its losses as well as beneficiaries of its profits, in the absence of a specific agreement defining by express terms the status of the part owners."[55] Thus, where the parties agree that one shall furnish the capital and the building, the other manage the purchases and sales for a drug department, such department to be charged with rent and the other expenses of conducting it and the net profits or losses to be divided among the parties in certain proportions, this has been held to constitute a partnership.[56] Acts whereby the parties seek to avoid partnership liability, such as concealing the fact that a partnership exists or obscuring the purposes for which the parties associate themselves together, are of no avail when the fact that a partnership does exist is once established. Thus, where parties associated themselves together to deal in lumber land, one to furnish the capital and the other to render services in conducting such business, the profits to be divided between them after paying interest on the money advanced by the first party, it was held that a partnership was created, notwithstanding the parties did not make public the fact of their business connection,

[53] Bogardus v. Reed, 160 App. Div. 294, 145 N. Y. S. 597.

[54] Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Lockwood v. Doane, 107 Ill. 235; Ryder v. Wilcox, 103 Mass. 24; Southern Fertilizer Co. v. Reames, 105 N. Car. 283, 11 S. E. 467; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Cothran v. Marmaduke, 60 Tex. 370; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

[55] Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955.

[56] Leber v. Dietz, 22 Misc. (N. Y.) 524, 49 N. Y. S. 1002.

but instead concealed it.[57] It has been held that an agreement between landowners to sell timber off their land,[58] to sell land,[59] or an agreement by one to furnish money necessary for the manufacture of an article patented by the other,[60] an agreement whereby one party is to make estimates and furnish iron for bridges, and the other to supply additional material and work and solicit orders,[61] or an agreement whereby two attorneys take certain designated cases together, and agree to pay the costs and divide the profits,[62] constitutes a partnership when the essential elements are present. It has also been held that where the testimony showed that the defendant was to furnish money to buy mules, and that the plaintiff was to furnish the feed and care for them and help sell them, and that they were then to divide the profits, it was sufficient to uphold a finding that a partnership existed.[63] It must constantly be borne in mind that a "partnership is a fact—a fact sometimes made out like other facts, from circumstances as well as by direct evidence."[64] If it appears to have been the purpose of the parties to enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses while securing certainty of the advantages to be derived from the relation, must be disregarded.[65] If the real party in interest in organizing a partnership, for business reasons procured another to sign the articles in his place, both he and the signer were bound by the agreement, and were liable for the subscription.[66] Where one party to a part-

[57] Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154.

[58] Tanner v. Hughes, 21 Ky. L. 77, 50 S. W. 1099.

[59] Cronkrite v. Trexler, 187 Pa. St. 100, 41 Atl. 22.

[60] Illinois Malleable Iron Co. v. Reed, 102 Iowa 538, 71 N. W. 423.

[61] Clinton Bridge &c. Iron Works v. First Nat. Bank, 103 Wis. 117, 79 N. W. 47.

[62] Southworth v. People, 183 Ill. 621, 56 N. E. 407.

[63] Jones v. Stever, 154 Mo. App. 640, 136 S. W. 16.

[64] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402; Fechteler v. Palm, 133 Fed. 462, 66 C. C. A. 336; Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154. The foregoing has special reference to those cases in which there is no agreed statement of facts.

[65] Johnson v. Carter, 120 Iowa 355, 94 N. W. 850.

[66] Torbe v. Strauss, 155 Wis. 518, 144 N. W. 184, rehearing denied Id. 1136.

nership agreement to buy and sell real property was to furnish fifteen thousand dollars purchase price, or as much thereof as was necessary, the contract was not invalid because of indefiniteness.[67]

§ 217. **Cases in which relation was not created.**—Since the existence of a partnership is a question of fact to be proved there must be evidence which establishes a partnership relation. In the absence of evidence to establish this fact the parties can not be held as partners.[68] All the elements necessary to constitute a partnership contract must be present. Thus, where one merely hired the use of another hotel from day to day and agreed to pay therefor a sum equal to one-third of the gross receipts and gross earnings, it was held that no partnership existed since the parties were not mutual agents. The one who owned the building had nothing whatever to do with the business conducted in it.[69] It has also been held that where there is a total lack of evidence to show that there was an agreement between the parties by which they would share in the profits, or that there was any understanding as to the proportion in which such profits should be shared, and where the evidence of the party to the agreement who sought to establish the partnership indicated that he himself had no idea, much less an intention, of bearing any loss, no partnership was shown.[70] An interest in profits which arise through use of office space does not establish a partnership.[71] Where a contract provided that one who had applied for letters patent, assigned a half interest in such patent to another, who was to

[67] Floyd v. Kicklighter, 139 Ga. 133, 76 S. E. 1011.

[68] See Harris v. Sessler, 67 Tex. 383, 3 S. W. 316.

[69] Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. To the effect that there must be a mutual agency, see Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822.

[70] La Cotts v. Pike, 91 Ark. 26, 120 S. W. 144, 134 Am. St. 48. In the above case the instrument relied on to show the partnership agreement was a deed. This deed was held to make the parties tenants in common, and not partners. The case holds that there must be something more than a joint ownership of property to constitute a partnership.

[71] Hately v. Kiser, 162 Ill. App. 542.

pay the expenses of procuring the patents, they were common owners, not partners.[72] Where one agreed to raft another's logs to a saw-mill and give him half of the price received, which was already fixed, no partnership was formed.[73] Neither does the fact that one looks to the profits of a business, in which he has no interest and under another's management, for payment of a personal debt make the former a partner with the latter. The amount due is merely a personal debt, and remains such if not paid out of the profits.[74] None of the following agreements created partnerships, it was held: Where an individual who advanced money to help carry out a construction contract was to receive one-third the profits, but had no control over the work,[75] whereby one party was to furnish money to purchase horses,[76] where an employé of a proprietor retiring from business was to pay all expenses, and receive the balance of the income of the business over a specified sum per month,[77] where three persons associated to sell stock and one was to furnish office rent and services, another advertising and printing and a third services in sales, advertising and correspondence and they were to divide net profits,[78] a contract to purchase real estate, each to pay a proportionate part of the price, and acquire a specified interest,[79] an agreement that one would purchase ground and furnish money for the construction of four houses thereon, while the other party was to superintend the construction, and they would divide profits when the houses were sold.[80]

Under joint and several contracts between two ice companies and car companies, whereby the ice companies were to furnish

[72] Williams v. Knibbs, 213 Mass. 534, 100 N. E. 666.

[73] Collier v. De Jernett, 1 Ala. App. 588, 56 So. 101.

[74] Cudahy Packing Co. v. Hibou, 92 Miss. 234, 46 So. 73, 18 L. R. A. (N. S.) 975. See, however, Webb v. Hicks, 123 N. Car. 244, 31 S. E. 479.

[75] Post v. New York, 148 N. Y. S. 568.

[76] Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935.

[77] Miles v. Miles (Iowa), 150 N. W. 21.

[78] Wade v. Hornaday, 92 Kans. 293, 140 Pac. 870.

[79] Gamble v. Loffler, 28 S. Dak. 239, 133 N. W. 288; MacPherson v. Harding, 40 App. D. C. 404.

[80] Miller v. Pepperling, 185 Mo. App. 222, 170 S. W. 328.

ice for refrigerator cars, and under which they were accustomed to divide the business, each furnishing to the cars on the railroad track nearest their plant, and buying ice from the other ice company if short, the ice companies were not partners.[81] One can not be charged as a partner of his bankrupt brother under the South Dakota code where the business was conducted in the name of the brothers as partners, but the one brother had invested no capital, merely worked for the bankrupt on a salary, and there was no agreement to share profits and losses, for under the code there must be a carrying on of business together and a division of profits.[82] A contract by which one was to sell automobiles for another and receive half the profits on sales, does not make them partners.[83]

The holders of certificates in a speculating pool who were to share in the profits of money invested by the promoter of the pool and providing for the drawing out of their money upon ten days' notice, were not partners with the manager and promoter, but were held merely to have loaned him money.[84] An agreement whereby two attorneys agree to conduct a certain litigation for a client, the client to pay the attorney's fees and other necessary costs, the attorneys to divide the fees, does not constitute the attorneys partners.[85] Nor does an association of dredgers whereby they fix prices and divide up work constitute a partnership.[86] Where three brokers had offices together, each paying a share of the expenses, and doing business in his own name, but dividing commissions with the others if they assisted in making a sale, they were not partners as to a sale made by one with the assistance of the others.[87] A bailment was created, not a partnership, where the owner of cattle delivered them to another to

[81] El Paso Ice & Refrigerator Co. v. Consumers' Ice & Cold Storage Co. (Tex. Civ. App.), 141 S. W. 551.

[82] In re Gibson, 191 Fed. 665.

[83] Studebaker Corporation of America v. Dodds, 161 Ky. 542, 171 S. W. 167.

[84] In re Norris, 190 Fed. 101.

[85] Willis v. Crawford, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904.

[86] Potter v. Morris &c. Dredging Co., 59 N. J. Eq. 422, 46 Atl. 537.

[87] Culbertson v. Sheridan, 93 Kans. 268, 144 Pac. 268.

keep for a specified term of years, the increase to be divided, the original herd returned, a certain amount of shrinkage to be borne by the owner, and loss above that by both in fixed proportions, the owner to pay the taxes.[88] The fact that the parties to a contract of mandate agreed to divide the profits does not make it a contract of partnership.[89] Where the defendant, owner of a farm, employed his brother as agent to sell the farm, and the plaintiff to advertise it in return for a commission, the plaintiff to turn over to the brother answers to the advertisement, the brother of the landowner and the plaintiff were not partners, and the plaintiff could sue for his commission alone.[90] Where one contracts for the sale of goods to be resold by him, usually it is held not a partnership but a sale, even if profits are shared as a commission.[91]

§ 218. Creation of partnership for dealing in real estate—Verbal agreement—Statute of frauds.—It has been a mooted question whether a partnership can be created by parol for the purpose of buying and selling lands for profit. It is now quite generally accepted as the established doctrine that such an agreement is not within the statute. A partnership of this kind, like any other contract of partnership, is an agreement to share in the profit and loss of certain business transactions, and may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture.[92] The

[88] Simmons v. Shaft, 138 Pac. 614, 91 Kans. 553. It must be understood that the two preceding sections have nothing to do with estoppel. One may be estopped to deny the partnership and be held liable as if he were a partner. The mere fact that one is estopped to deny the partnership does not make him a partner inter se.

[89] Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co., 133 La. 424, 63 So. 96.

[90] Dodge v. Childers, 167 Mo. App. 448, 151 S. W. 749.

[91] Dr. Koch Vegetable Tea Co. v. Malone (Tex. Civ. App.), 163 S. W. 662. See Einstein v. Gourdin, 4 Woods (U. S.) 415, Fed. Cas. No. 4320.

[92] Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745n, 29 Am. St. 133; Jones v. Patrick, 140 Fed. 403; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169 (affg. 79 Ill. App. 139); Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. 473; Mallon v. Buster, 121 Ky. 379, 89 S. W. 257, 123 Am. St. 201; Garth v. Davis, 120 Ky.

rule, as stated in a leading case on this question[93] to the effect that the existence of such a partnership can be shown by general evidence, without the necessity of a written agreement, has been generally followed, and, although there are some decisions to the contrary, it may now be said to be the prevailing rule upon that subject. The cases proceed upon the theory that the real estate of a partnership is treated and administered in equity or between partners and for all the purposes of the partnership, as personal

106, 85 S. W. 692, 117 Am. St. 571; Vaught v. Hogue, 32 Ky. L. 1061, 107 S. W. 757; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. 367, 7 Am. & Eng. Ann. Cas. 1140; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Rice v. Parrott, 76 Nebr. 501, 107 N. W. 840, 111 N. W. 583; Buckley v. Doige, 188 N. Y. 238, 80 N. E. 913, 11 Am. & Eng. Ann. Cas. 263; Rauch v. Donovan, 126 App. Div. (N. Y.) 52, 110 N. Y. S. 690; Pounds v. Egbert, 117 App. Div. (N. Y.) 756, 102 N. Y. S. 1079; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. 840, 13 A. & E. Ann. Cas. 138; Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883n. See also note in 4 L. R. A. (N. S.) 427. See generally on subject of this section, 2 Columbia Law Review, p. 461.

[93] Dale v. Hamilton (1846), 5 Hare 369. While Dale v. Hamilton, 5 Hare 369, is to some extent shaken by the case of Caddick v. Skidmore (1851), 2 DeG. & J. 52 (an agreement to become partners in a mine), it is still recognized as authority. See also Gray v. Smith (1889), 43 L. R. Ch. Div. 208, 59 L. J. Ch. 145, 38 W. R. 310; Essex v. Essex, 20 Beav. 442; Bunnel v. Taintor, 4 Conn. 568; Kilbourn v. Latta, 5 Mack. (D. C.) 304, 60 Am. Rep. 373; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Black v. Black, 15 Ga. 445; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Marsh v. Davis, 33 Kans. 326, 6 Pac. 612; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. 617; Personette v. Pryme, 34 N. J. Eq. 26; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Bissell v. Harrington, 18 Hun (N. Y.) 81; Traphagen v. Burt, 67 N. Y. 30; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141; Gibbons v. Bell, 45 Tex. 417. See note to McCormick's Appeal, 98 Am. Dec. 197. See also cases cited in the preceding note. Contra: Butts v. Cooper, 152 Ala. 375, 44 So. 616; Everhart's Appeal, 106 Pa. St. 349; Smith v. Burnham, 3 Sumn. (U. S.) 435, Fed. Cas. No. 13019; Walker v. Herring, 21 Grat. (Va.) 678, 8 Am. Rep. 616; Bird v. Morrison, 12 Wis. 138; Langley v. Sanborn, 135 Wis. 178, 114 N. W. 787; Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; McMillen v. Pratt, 89 Wis. 612, 62 N. W. 588 (holding verbal contract for the promotion of a partnership to purchase standing timber within the statute).

property and partnership assets.[94] Thus by the great weight of authority a parol partnership agreement to deal in real estate is valid and not void as within the statute of frauds,[95] although in a number of jurisdictions such an agreement is held void under

[94] McClintock v. Thweatt, 71 Ark. 323, 73 S. W. 1093; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Bunnel v. Taintor, 4 Conn. 568; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. 473; Morrill v. Colehour, 82 Ill. 618; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 117 Am. St. 571; Trowbridge v. Wetherbee, 11 Allen (Mass.) 361; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. 617; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Howell v. Kelly, 149 Pa. St. 473, 24 Atl. 224; Bruce v. Hastings, 41 Vt. 380, 98 Am. Dec. 592; Dale v. Hamilton, 5 Hare 369. See also Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637 (affg. 6 App. Div. (N. Y.) 28, 39 N. Y. 527).

[95] Dale v. Hamilton, 5 Hare 369, 16 L. J. Ch. 126, 11 Jur. 163; McElroy v. Swope, 47 Fed. 380; Brown v. Spencer, 163 Cal. 589, 126 Pac. 493; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Smith v. Padrosa, 139 Ga. 484, 77 S. E. 639; Robinson v. Horner, 176 Ind. 226, 95 N. E. 561; Holmes v. McCray, 51 Ind. 358, 19 Am. Rep. 735; Keller v. Fitzgerell, 249 Ill. 451, 94 N. E. 926; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169 (affg. 79 Ill. App. 139; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. 473; Richards v. Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; Goodwin v. Smith, 144 Ky. 41, 137 S. W. 789; Garth v. Davis, 120 Ky. 106, 27 Ky. L. 505, 85 S. W. 692, 117 Am. St. 571; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. 617; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Hirbour v. Reeding, 3 Mont. 15; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Am. & Eng. Ann. Cas. 263; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141; Traphagen v. Burt, 67 N. Y. 30; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Larkin v. Martin, 46 Misc. (N. Y.) 179, 93 N. Y. S. 198; Bailey v. Weed, 36 App. Div. (N. Y.) 611, 55 N. Y. S. 253; Ostrander v. Snyder, 73 Hun (N. Y.) 378, 57 N. Y. St. 289, 26 N. Y. S. 263; Clark v. Mitchell, 35 Nev. 447, 130 Pac. 760, 134 Pac. 448; Falkner v. Hunt, 73 N. Car. 571; Thompson v. McKee, 43 Okla. 243, 142 Pac. 755, L. R. A. 1915 A, 521 and note; Flower v. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Moran v. McDevitt (R. I.), 83 Atl. 1013; Hardin

the statute of frauds.[96] Although a partnership in land may be proved by parol evidence, yet an agreement by one of the parties to retire and assign his share in the partnership assets is an agreement to assign an interest in land.[97] So, also, an oral contract between the members of a copartnership to convey firm realty from one to the other is within the statute.[98] An agreement to place the title to property which one party owns, in a partnership which was to be formed in order to develop the land and sell it at a profit, is for the sale of land and within the statute.[99]

v. Hardin, 25 S. Dak. 601, 129 N. W. 108; Burgwyn v. Jones, 113 Va. 511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1913 E, 564n; Case v. Seger, 4 Wash. 492, 30 Pac. 646; Archibald v. McNerhanie, 29 Can. Sup. Ct. 564; Leslie v. Hill, 25 Ont. L. Rep. 144, 20 Ont. Week. Rep. 490 (affd. 28 Ont. L. Rep. 48). See also Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883n.

[96] Smith v. Burnham, 3 Sumn. (U. S.) 435, Fed. Cas. No. 13019. To same effect, Rowland v. Boozer, 10 Ala. 690; Gray v. Palmer, 9 Cal. 616, disapproved in Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Young v. Wheeler, 34 Fed. 98, from C. C. Dist. Colo. Contra: Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Caddick v. Skidmore, 2 DeG. & J. 52, 27 L. J. Ch. (N. S.) 153, 3 Jur. (N. S.) 1185, 6 Week. Rep. 119, 13 Mor. Min. Rep. 383; note 16 L. R. A. 745; Brown v. Grady, 6 B. C. 190; Raub v. Smith, 61 Mich. 543, 28 N. W. 676, 1 Am. St. 619; Nester v. Sullivan, 147 Mich. 493, 111 N. W. 85, 9 L. R. A. (N. S.) 1106 (modified in 147 Mich. 508, 111 N. W. 1033); Bird v. Morrison, 12 Wis. 138; Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; Langley v. Sanborn, 135 Wis. 178, 114 N. W. 787; Huntington v. Burdeau, 149 Wis. 263, 135 N. W. 845, in which, however, it was held that where all transactions were so far completed that nothing was necessary save for the court to ascertain the amount of money due from one party to the other, the void contract will be treated as fully executed and not within the statute. Under the civil code of Louisiana such agreement must be in writing. Pecot v. Armelin, 21 La. Ann. 667. See also Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822 (with which compare, however, Rice v. Parrott, 76 Nebr. 501, 107 N. W. 840, 111 N. W. 583). And see Dunphy v. Ryan, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. 486.

[97] Gray v. Smith (1889), L. R. 43 Ch. Div. 208, 59 L. J. Ch. 145, 38 W. R. 310.

[98] Brewer v. Cropp, 10 Wash. 136, 38 Pac. 866, "While the real estate owned by the partnership is regarded as personal property for some purposes, it is an equitable conversion only, and the requirements of the law relating to conveyances of land must be observed in disposing of it." See also Henderson v. Henrie, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628.

[99] Burgwyn v. Jones, 113 Va. 511, 75

§ 219. Cases distinguished—How contract may be taken out of statute.—While there is apparently conflict among the authorities as to whether a verbal partnership may be formed to deal in lands, it is believed that very little conflict in fact exists. On account of different ends sought by the litigants, two lines of authorities have been announced neither of which is necessarily inconsistent with the other. In those cases in which an action is brought for an accounting or for a share of the profits of speculation on resale,[1] the oral contract is upheld; but when the action is brought, not to enforce an interest in the profits of the transaction, but in the land itself, and the real estate has not been bought with partnership funds and there are no other circumstances to take the case out of the statute, the parol partnership agreement to deal in lands will be held within the statute.[2] In other words, many of the cases, including several of those cited as holding the agreement valid, hold or concede that an interest in the land itself can not be established by parol,[3] but that a right to share in the profits resulting from such transaction may be established by parol.[4] It is believed that these last cases give expression to the true rule, and that the conflict in the decisions holding that a parol partnership agreement can or can not be entered into to deal in real estate is more apparent than real, for it may well be that an interest in the land itself can not

S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1913 E, 564n.

[1] Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745n, 29 Am. St. 133; Rice v. Parrott, 76 Nebr. 501, 107 N. W. 840, 111 N. W. 583; Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288. See also Logan v. Brown, 20 Okla. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298 and note.

[2] Parsons v. Phelan, 134 Mass. 109; Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945; Mancuso v. Rosso, 81 Nebr. 786, 116 N. W. 679. See also Nester v. Sullivan, 147 Mich. 493, 111 N. W. 85, 9 L. R. A. (N. S.) 1106; Dodson v. Dodson, 26 Ore. 349, 37 Pac. 542.

[3] Morton v. Nelson, 145 Ill. 586, 72 N. E. 916; McKinley v. Lloyd, 128 Fed. 519; Wiley v. Wiley, 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913A, 789.

[4] Wright v. Smith, 105 Fed. 841, 45 C. C. A. 87; Jones v. Patrick, 140 Fed. 403; Eaton v. Graham, 104 Ill. App. 296; In re Everhart's Appeal, 106 Pa. St. 349.

be established by parol; and yet at the same time a partnership agreement relating to the profits or dealing in land for profit can be shown without violating this rule.[5] But the statute does not apply where real estate is bought in connection with the partnership business and is paid for with firm funds even though title is taken in the name of one partner only.[6] It is also held as a general rule that a contract whereby two or more persons agree to prospect for and locate mining claims to be held in joint ownership by the parties is not within the statute, and need not be in writing.[7] Part performance of an oral contract of partnership in lands otherwise within the statute may take the agreement out of the statute.[8] The taking possession of the land by the partnership has been held sufficient part performance to take the contract out of the statute.[9] An entry on the books of the partnership may be sufficient to comply with the statute.[10] A partner may also take by operation of law regardless of the statute of frauds.[11]

[5] Beebe v. Olentine, 97 Ark. 390, 134 S. W. 936; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. (N. S.) 455; Norton v. Brink, 75 Nebr. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. 822; Rice v. Parrott, 76 Nebr. 501, 107 N. W. 840, 76 Nebr. 505, 111 N. W. 583; note in 102 Am. St. 238, 239; Wiley v. Wiley, 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913 A, 789.

[6] Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Lucas v. Cooper, 15 Ky. L. 642, 23 S. W. 959; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

[7] Shea v. Nilima, 133 Fed. 209, 66 C. C. A. 263; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. 803, 11 Am. St. 229; Settembre v. Putnam, 30 Cal. 490; Gore v. McBrayer, 18 Cal. 582; Meylette v. Brennan, 20 Colo. 242, 38 Pac. 75; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Murley v. Ennis, 2 Colo. 300; Doyle v. Burns, 123 Iowa 488, 99 N. W. 195; Hirbour v. Reeding, 3 Mont. 15. See also Cascaden v. Dunbar, 157 Fed. 62, 84 C. C. A. 566; Jones v. Patrick, 140 Fed. 403. Contra: Craw v. Wilson, 22 Nev. 385, 40 Pac. 1076.

[8] McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530, 14 U. S. App. 433; Chase v. Angell, 148 Mich. 1, 108 N. W. 1105, 118 Am. St. 568; Huntington v. Burdeau, 149 Wis. 263, 135 N. W. 845. Here contract was in effect fully executed.

[9] Tillis v. Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. 31, 8 Ann. Cas. 78.

[10] National Union Bank v. National Mechanics' Bank, 80 Md. 371, 30 Atl. 913, 27 L. R. A. 476, 45 Am. St. 350.

[11] Gorder v. Pankonin, 83 Nebr. 204, 119 N. W. 449, 131 Am. St. 629.

§ 220. Partnership agreements between carriers.—In cases involving the liability of carriers, the question often arises as to whether connecting carriers are partners, and are to be held liable as such on their contracts of carriage. If several connecting carriers have made themselves partners in the transportation business, each will be liable for the negligence or breach of contract of any of the others, in performing a contract for the transportation of goods over the connecting lines.[12] The same liability arises if they have jointly undertaken the carriage of goods.[13] Where the contract was carried out by carriers acting in each other's behalf, they were held partners in England.[14] In order to create a partnership between connecting carriers, which will make each liable for a loss anywhere on the line, there must, as a general rule, be more than merely taking part in a through shipment, issuing a through bill of lading, or imposing or sharing in a through freight rate. Thus the facts that a through shipment of live stock was made, by which the shipment must pass over several lines of road before reaching its destination; that one entire charge was fixed and was collected by the last carrier, which also furnished feed, and collected for the feed furnished by it and the other carriers, and that a person was allowed free transportation over each line to care for the stock, are not sufficient to show either a partnership or a joint undertaking, when the contract of the initial carrier limited liability to its own line, and the other carriers were required by a state statute to transport the freight of connecting railroads.[15] The same rule was applied where the goods were shipped on through bills of lading; the last

[12] Wilson v. Louisville &c. R. Co., 103 App. Div. 203, 92 N. Y. S. 1091; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Missouri &c. R. Co. v. Jarrell, 38 Tex. Civ. App. 425, 86 S. W. 632. See note 52 L. R. A. (N. S.) 861.

[13] Independence Mills Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Sisson v. Cleveland & T. R. Co., 14 Mich. 489, 90 Am. Dec. 252; Wilson v. Louisville & N. R. Co., 103 App. Div. 203, 92 N. Y. S. 1091.

[14] Gill v. Manchester &c. R. Co., 42 L. J. Q. B. 89, L. R. 8 Q. B. 187, 28 L. T. 587.

[15] Gulf &c. R. Co. v. Baird, 75 Tex. 256, 12 S. W. 530; Ft. Worth &c. R. Co. v. Johnston, 5 Tex. Civ. App. 24, 23 S. W. 827.

carrier's line did not extend to the place of shipment; and such carrier issued an expense bill on the arrival of the goods for the freight charges called for by the bill of lading, and after the car came through and the expense bill had been presented, the carrier demanded more freight.[16] There are some earlier cases in the same state in which it was said that a partnership or joint undertaking might be inferred from the issuance of a through bill of lading, the payment of a through freight rate to one carrier, and the shipment in a special through car.[17] Merely an agreement between connecting carriers for the division in certain proportions of the through freight rate does not make them liable as partners to shippers;[18] nor does an agreement for through transportation over connecting lines at an agreed freight rate;[19] nor a traffic arrangement for a division of receipts or the profits of the transportation.[20] However, there are other cases in which carriers have been held liable as partners, or as joint undertakers, when there was very little distinction between them and the cases just cited. Thus, where carriers unite to form a through freight line known as the "Atlantic Coast Despatch," issue through bills of lading, and collect the whole freight, which is divided among the carriers in proportion to their respective mileage, they become partners, each liable for a loss on any part of the through line.[21] Partnership, it is held, may be inferred where two railway companies forming a continuous line have the same freight agent at the point of connection, the same train despatcher and other employés, and the route over which a shipment is to be made is under the supervision of a common traveling freight

[16] Ft. Worth &c. R. Co. v. Johnston, 5 Tex. Civ. App. 24, 23 S. W. 827.

[17] Missouri Pac. R. Co. v. Creath, 3 Tex. App. Civ. Cas. (Willson) 109; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

[18] Hot Springs R. Co. v. Trippe, 42 Ark. 465, 48 Am. Rep. 65; Merrick v. Gordon, 20 N. Y. 93; Phifer v. Carolina C. R. Co., 89 N. Car. 311, 45 Am. Rep. 687.

[19] Chesapeake &c. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161.

[20] Wilson v. Louisville & N. R. Co., 103 App. Div. 203, 92 N. Y. S. 1091.

[21] Rocky Mount Mills v. Wilmington & W. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682.

agent.[22] But the fact that each carrier carries the cars of the other having a common name over its road without breaking bulk, each fixing its own rates, does not establish partnership liability where there is no joint expense, loss or profit, except that when a loss can not be located as having occurred on any particular road, each carrier bears its pro rata share.[23] Where a railway company and a company operating transfer tracks to a stockyards have an arrangement whereby the transfer company for a switching charge, took the cars from the railway company's track and hauled them to the stockyards and collected the freight, which it turned over to the railroad company, no partnership is created.[24] Where carriers have so conducted their business as to become partners as to shippers, one of them can not prevent liability for loss on any part of the through line by stipulating in the bill of lading that it is liable only for loss on its own line.[25] In closing this section, it should perhaps be added by way of caution that the Interstate Commerce Law with its amendments and Act of Congress of March 4, 1915, make some changes in the law in regard to liability of connecting carriers.

§ 221. Parties to executory partnership agreement.—The parties to a mere executory agreement to form a partnership are not liable as partners until the partnership is formed.[26] This rule

[22] Illinois C. R. Co. v. Jones, 87 Miss. 489, 39 So. 493.

[23] Irvin v. Nashville C. &c. R. Co., 92 Ill. 103, 34 Am. Rep. 116.

[24] Carter v. Chicago &c. R. Co., 146 Iowa 201, 125 N. W. 94.

[25] Rocky Mount Mills v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682; Galveston &c. R. Co. v. Houston (Tex. Civ. App.), 40 S. W. 842; Atchison &c. R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286. See also Alcorn v. Adams Express Co., 148 Ky. 352, 146 S. W. 747, 52 L. R. A. (N. S.) 858 and note.

[26] "It is the carrying on of a business, not an agreement to carry it on, which is the test of partnership. Hence the importance of distinguishing between actual and contemplated partnerships. Persons who are only contemplating a future partnership or who have only entered into an agreement that they will at some future time become partners, can not be considered as partners before the arrival of the time agreed upon. It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. If the parties to the agreement have begun to carry on business, although prematurely, they will be partners. But the

applies to conditional agreements where the partnership is not to begin until a certain time has arrived, or a certain contingency taken place.[27] As is said in some cases, the partnership must be launched and before that time, the only remedy between the parties for a refusal to perform the agreement is in equity for specific performance, or at law for damages.[28] An agreement to enter into a partnership according to articles to be drawn later does not create a partnership.[29] An option given one to become a partner in a present partnership does not make him a partner until he exercises the option.[30]

An agreement whereby one party was to give an option on property and do certain work, and the other parties were to lease the property, erect a building and after deducting advances, make him a partner, did not create a present partnership.[31] If one party dies before the time fixed to begin the partnership or fails to perform a condition precedent, a partnership will never be created.[32] Performance of preliminary conditions may be

premature action of one, unless acquiesced in by the others, will not affect them." Lindley Partnership (8 ed.), p. 16. See Taylor v. Nelson (Cal. App.), 147 Pac. 1189.

[27] Drennen v. London Ass. Co., 113 U. S. 51, 5 Sup. Ct. 341, 28 L. ed. 919; Reboul v. Chalker, 27 Conn. 114; Johnston v. Eichelberger, 13 Fla. 230; Wilson v. Wilson, 6 Idaho 597, 57 Pac. 708; Metcalf v. Redmon, 43 Ill. 264; Haskins v. Burr, 106 Mass. 48; Dow v. State Bank, 88 Minn. 355, 93 N. W. 121; Atkins v. Hunt, 14 N. H. 205; Westwood v. Cole, 66 Misc. 53, 120 N. Y. S. 884; Mosier v. Parry, 60 Ohio St. 388, 54 N. E. 364; Irwin v. Bidwell, 72 Pa. St. 244; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; O'Marrow v. State (Tex. Cr. App.), 147 S. W. 252; State v. Mendenhall, 24 Wash. 12, 63 Pac. 1109; Hoile v. York, 27 Wis. 209; Holgate v. Downer, 8 Wyo. 344, 57 Pac. 918; Dickinson v. Valpy, 10 B. & C. 128; Osborne v. Julion, 3 Drew. 596, 26 L. J. Ch. 6, 4 W. R. 767.

[28] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Doyle v. Bailey, 75 Ill. 418; Gray v. Gibson, 6 Mich. 300; Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467.

[29] Syers v. Syers, 1 App. Cas. 174.

[30] Sabel v. Savannah Rail &c. Co., 135 Ala. 380, 33 So. 663; Bruner v. Moore (1904), 1 Ch. 305; Ex parte Davis, 4 DeG., J. & Sm. 523; Gabriel v. Evill, 9 M. & W. 297, Car. & M. 358; Howell v. Brodie, 6 Bing. N. Cas. 44.

[31] Eastman v. Dunn, 83 Atl. 1057, 34 R. I. 416.

[32] Metcalf v. Redmon, 43 Ill. 264; Dow v. State Bank, 88 Minn. 355, 93 N. W. 121.

waived,[33] but waiver must clearly appear and will not be assumed.[34]

Where parties agreed orally to form a partnership and began business and acted in a firm name, but finally could not agree on the articles of partnership, it was held there was no partnership actually existing entitling one party to an accounting.[35] However, partnership liability as to third persons, arising at a time prior to the signing of partnership articles, may be shown where the parties by their acts, declarations and dealings, caused such third persons to deal with them as partners.[36]

§ 222. Partnership agreement induced by fraud.—It was seen in preceding sections in this chapter that in order to make a person a member of a partnership he must have consented to the relation. Undoubtedly, where the consent of a party to a partnership agreement was secured by fraud or duress, it is voidable as between the parties,[37] and one entering into such an agreement, may on discovering the fraud, rescind the contract and recover the money contributed to the partnership fund. As the relations between persons contemplating a partnership are confidential, and each is then held to the exercise of the utmost good faith,[38] it has been held that a partnership contract may be rescinded even for innocent misrepresentation which would not justify the rescission of a contract of sale and purchase.[39]

[33] First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831.

[34] Johnston v. Eichelberger, 13 Fla. 230; Bird v. Hamilton, Walk. Ch. (Mich.) 361.

[35] Martin v. Baird, 175 Pa. St. 540, 34 Atl. 809.

[36] Cain Lumber Co. v. Standard Dry-Kiln Co., 108 Ala. 346, 18 So. 882; First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831; Morrill v. Spurr, 143 Mass. 257, 9 N. E. 580; Atkins v. Hunt, 14 N. H. 205; Hartman v. Woehr, 18 N. J. Eq. 383; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Davis v. Evans, 39 Vt. 182; Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670.

[37] Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; White v. Smith, 63 Ark. 513, 39 S. W. 555; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Troster v. Dann, 83 Misc. 399, 145 N. Y. S. 56; Maddeford v. Austwick, 1 Sim. 89, 2 Eng. Ch. 89, 57 Eng. Reprint 512 (affg. 2 Myl. & K. 279).

[38] See §§ 341, 381 infra.

[39] Powell v. Cash, 54 N. J. Eq. 218, 34 Atl. 131 (affd. 55 N. J. Eq. 826, 41

It is not even necessary that pecuniary loss be shown in order to entitle one to release from the contract creating confidential relation, entered into with one who abused that confidence even slightly at the formation of the contract.[40] However, one may, with full knowledge of the facts, ratify a partnership agreement entered into because of fraud,[41] and thus lose the right of rescission, or he may waive the right to rescind, and sue for damages.[42] Where the fraud was as to the purchase-price of the goods, he need not rescind but may enforce against his partner his right to contribute only his proportion of the actual cost of the stock,[43] or if he has paid his proportion as represented by the defrauding partner, can recover from the latter the difference between the amount paid and the proportional part of the actual cost of the goods to the copartner, irrespective of the fact that the goods were worth more than the price represented.[44] Nor does the sale of his interest by a defrauded partner bar his action against the defrauding partner for deceit.[45] The fact that one was induced by fraud to enter into a partnership agreement, does not affect his liability to third parties who relied on the fact of his holding out as a partner.[46]

Atl. 1115); Rawlins v. Wickham, 7 Gifford 355, 4 Jur. (N. S.) 990, 65 Eng. Reprint 954 (affd. 3 DeG. & J. 304, 5 Jur. (N. S.) 278, 60 Eng. Ch. 237, 44 Eng. Reprint 1285).

[40] Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Powell v. Cash, 54 N. J. Eq. 218, 34 Atl. 131 (affd. 55 N. J. Eq. 826, 41 Atl. 1115); Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859 (affg. 82 Hun 292, 31 N. Y. S. 487); Troster v. Dann, 145 N. Y. S. 56, 83 Misc. 399; Fuller v. Atwood, 13 R. I. 316; Beene v. Rotan Grocery Co., 50 Tex. Civ. App. 448, 110 S. W. 162; Caplen v. Cox, 42 Tex. Civ. App. 297, 92 S. W. 1048; Kimmins v. Wilson, 8 W. Va. 584; Adam v. Newbigging, 13 App. Cas. 308, 57 L. J. Ch. 1066.

[41] St. John v. Hendrickson, 81 Ind. 350; Fuller v. Atwood, 13 R. I. 316; Riddel v. Smith, 10 L. T. Rep. 561, 12 W. R. 899. Compare Rambo v. Patterson, 133 Mich. 655, 95 N. W. 722.

[42] Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Vennum v. Palmer, 123 Ill. App. 619; Rice v. Culver, 32 N. J. Eq. 601.

[43] Pickett v. Wren (Mo. App.), 174 S. W. 156.

[44] Pickett v. Wren (Mo. App.), 174 S. W. 156.

[45] Pickett v. Wren (Mo. App.), 174 S. W. 156.

[46] Oil Well Supply Co. v. Metcalf, 174 Mo. App. 555, 160 S. W. 897.

§ 223. **When relation begins.**—The time at which the relation of partnership begins is usually specified by the agreement which creates the partnership, and the relation begins at the specified time.[47] If any time must elapse or anything must be done before the right to share profits accrues, the parties are not partners until the time has elapsed or the act has been done.[48] Therefore it may be stated generally that a partnership begins when the right to share profits accrues.[49] If no time for commencement is specified by the partnership agreement, or no condition intervenes, the relation begins at once, as of the date of the agreement.[50]

It was held in one case that when a bid had been accepted and a bond had been furnished to guarantee the construction of certain public work by three associates who had agreed to furnish capital and jointly undertake the work, there was a partnership, although there was no written agreement, and one of the parties had not furnished his share of the money.[51] If the business is begun under the contract or it is apparent that the relation was intended to commence immediately after the signing of articles, the fact that one partner has not fully complied with his agreement nor paid in his part of the capital, does not render him less a partner.[52] As was seen in a former section relative to agreements contemplating the formation of a partnership in future, partnership liability under such an agreement does not arise until the time fixed by the agreement, or the happening of the contingency which is to determine its beginning.[53]

[47] National Bank v. Jennings Trust Co., 44 Ill. App. 285.

[48] Dow v. State Bank, 88 Minn. 355, 93 N. W. 121; Valentine v. Hickle, 39 Ohio St. 19.

[49] Whitehill v. Schickle, 43 Mo. 537.

[50] Floyd v. Kicklighter, 139 Ga. 133, 76 S. E. 1011; Phillips v. Nash, 47 Ga. 218; Kerrick v. Stevens, 55 Mich. 167, 20 N. W. 888; Austin v. Williams, 2 Ohio (2 Ham.) 64; Aspinwall v. Williams, 1 Ohio (1 Ham.) 84; Petrakion v. Arbelly, 26 N. Y. S. 731, 23 Civ. Proc. R. 183; Williams v. Jones, 5 B. & C. 108.

[51] McCabe v. Sinclair, 66 N. J. Eq. 24, 58 Atl. 412.

[52] Southern White-Lead Co. v. Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Hartman v. Woehr, 18 N. J. Eq. 383.

[53] See § 221 ante.

§ 224. Duration of relation.—The period of duration of a partnership is often fixed by the partnership agreement, and as a general rule, the partnership terminates at the expiration of the specified time.[54] If it is so stipulated, the partnership continues till the expiration of the fixed term, even though one partner dies.[55] If no specific time is fixed for the termination of the relation, the partnership ends when the transaction or venture for which it was organized is concluded.[56] Thus, a partnership for operating a hotel, leased to a partner for a specified time, is to continue during the term of the lease.[57] Where two parties agree together merely to buy a pearl at a certain time for their joint benefit if bought at that time, and then fail to make the purchase, one of them who bought the pearl at a later time need not account to the other for the profit.[58] If a partnership is to continue during the will of the partners, it may be terminated at any time at the pleasure of either partner.[59] Under the English Partnership Act, if no time is fixed for the duration of a partnership, it becomes a partnership at will.[60] A partnership agreement for preserving eggs "one year and so much longer as the parties may mutually desire," providing for the erection of a building, does not limit the partnership to a single investment in eggs, but provides for a continuing business.[61] Where a partnership for mining and trading engaged men to work for one year to be

[54] Dawson v. Boisseau, Man. Unrep. Cas. (La.) 185; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32.

[55] Brew v. Hastings, 196 Pa. St. 222, 46 Atl. 257, 79 Am. St. 706; Alexander v. Lewis, 47 Tex. 481.

[56] Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Gates v. Fraser, 6 Ill. App. 229; Richards v. Baurman, 65 N. Car. 162; Roberts v. Nunn (Tex. Civ. App.), 169 S. W. 1086.

[57] Zimmerman v. Harding, 227 U. S. 489, 57 L. ed. 608, 33 Sup. Ct. 387.

[58] Harris v. Umsted, 79 Ark. 499, 96 S. W. 146.

[59] Ruth v. Flynn, 26 Colo. App. 171, 142 Pac. 194; Fooks v. Williams, 120 Md. 436, 87 Atl. 692; Fletcher v. Reed, 131 Mass. 312; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Whipple v. Stuart, 26 Mont. 219, 66 Pac. 941; Sanger v. French, 157 N. Y. 213, 51 N. E. 979.

[60] English Partnership 1890, § 26 (1), § 32.

[61] Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432.

paid by a share of profits, this was an implication that the partnership was intended to last a year.[62]

§ 225. **Renewal or continuation.**—It has been held that where the term of a partnership expired and the parties agreed to a renewal, though not formally, it was renewed for the original term.[63] If the partnership is prolonged, by express or tacit consent, beyond the time specified in the articles, but with no new articles, the relation between the partners is still governed by the articles,[64] at least so far as applicable to a partnership at will.[65] After such continuation the relation can be terminated only by notice.[66] The fact that the business is not fully settled at the expiration of the term may have the result of continuing the relation until settlement.[67] The Uniform Partnership Act provides:[68] "When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will. A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie

[62] Potter v. Moses, 1 R. I. 430. See also Cole v. Moxley, 12 W. Va. 730; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432. Compare King v. Accumulative L. Fund &c. Assur. Co., 3 C. B. (N. S.) 151, 2 Jur. (N. S.) 1264, 27 L. J. C. P. 57, 91 E. C. L. 151.

[63] Dickinson v. Bold, 3 Desaus. (S. Car.) 501.

[64] Robertson v. Miller, Fed. Cas. No. 11926, 1 Brock. (U. S.) 466; Stephens v. Orman, 10 Fla. 9; Frederick v. Cooper, 3 Iowa 171; Sangston v. Hack, 52 Md. 173; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; Bradley v. Chamberlin, 16 Vt. 613.

[65] Daw v. Herring (1892), 1 Ch. 284, 61 L. J. Ch. 5, 65 L. T. Rep. (N. S.) 782; Neilson v. Mossend Iron Co., 11 App. Cas. 298.

[66] Jurgens v. Ittmann, 47 La. Ann. 367, 16 So. 952; Parsons v. Hayward, 4 DeG., F. & J. 474, 8 Jur. (N. S.) 924, 65 Eng. Ch. 368, 45 Eng. Reprint 1267.

[67] McGill v. Dowdle, 33 Ark. 311; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870. See Metz v. Commercial Bank, 45 S. Car. 216, 23 S. E. 13; Shapard Grocery Co. v. Hynes, 3 Ind. T. 74, 53 S. W. 486; J. Harzburg v. Southern R. Co., 65 S. Car. 539, 44 S. E. 75.

[68] Uniform Partnership Act, § 23.

evidence of a continuation of the partnership." This is practically a declaration of the general law as commonly understood. The Uniform Partnership Act also provides:[69] "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive, in accordance with his contract, the profits to which the assigning partner would otherwise be entitled."

[69] § 27 (1).

CHAPTER IX

PARTNERSHIP LIABILITY ON DEFECTIVE INCORPORATION

SECTION

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§ 230. Partnership liability of corporators before complete organization.—Persons who undertake to organize a corporation may be personally liable for all debts contracted on behalf of the intended corporation, with their consent, either express or implied, until the corporation is brought into being either as a de facto or a de jure organization. They are some-

times held liable as joint contractors.[1] But many courts have held that the co-adventurers are liable as partners if the corporation is not legally formed.[2] Where a body of associates intend to become incorporated, but incur liabilities before they have perfected the organization, they will generally be liable as partners.[3] In order to charge each associate as a partner, it must be shown that he was so acting at the time the contract in controversy was made, or that upon some consideration he agreed to be bound with the others.[4] Even where one member of such an association, acting for and on the authority of the others, incurs liability in his own name, or executes his individual note as evidence of such an indebtedness, not under seal, the obligee may go behind him and hold the other members of the association, on the principle that enables a person contracting with an agent to hold the undisclosed principal.[5] A statute imposing a general, joint and several liability for all the corporate debts has been held to create a liability as partners, to the same extent as if there had been no incorporation.[6] Where persons contract debts or incur liabilities in the name of a projected corporation, but before all acts necessary to bring the corporation into existence have been performed, they may be held liable as partners.[7] But in order to hold incorporators liable as partners because of lack of legal organization, it must be shown that they were so acting at the time the contract sued upon was made, or that there was an agreement that all should be liable.[8] And it has been held that a person who becomes a stockholder after an ineffectual attempt to incorporate, can not be held liable as a partner for the debts of the pretended corporation, when he took no part in its organization or manage-

[1] McFall v. McKeesport &c. Ice Co., 123 Pa. St. 259, 16 Atl. 478.

[2] Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Fuller v. Rowe, 57 N. Y. 23.

[3] Martin v. Fewell, 79 Mo. 401.

[4] Fuller v. Rowe, 57 N. Y. 23.

[5] Ferris v. Thaw, 72 Mo. 446 (affg. 5 Mo. App. 279); National Union Bank v. Landon, 45 N. Y. 410. See Snook's Petition, 2 Hilt. (N. Y.) 566.

[6] Planters' Bank v. Bivingsville Cotton Mfg. Co., 10 Rich. L. (S. Car.) 95.

[7] Ryland v. Hollinger, 117 Fed. 216, 54 C. C. A. 248.

[8] Fuller v. Rowe, 57 N. Y. 23. See DeWitt v. Hastings, 69 N. Y. 518.

ment.[9] As a general rule, the subscribers to the capital stock are liable for debts incurred in the process of organizing the corporation without regard to whether the capital has all been subscribed.[10] But the liability is not so certain where the creditor knows the facts and deals with the incomplete corporation without intending to hold the corporators individually liable.[11] Where the corporators are liable under this rule, they may not escape liability by a sale and transfer of their interest in the corporation.[12] Under a statute fixing the liability of the corporators in the case of incomplete incorporations, the liability imposed is held to constitute a fund for the benefit of all creditors and one incorporator may not commence proceedings for the appropriation of the whole or any part of such fund for his own benefit.[13] It has been held that individual incorporators are not liable for fraudulent representations of an agent in the sale of stock, unless they sanctioned or participated in the act.[14] But it has also been held that the acceptance of an assignment of a lease and the assumption of obligations thereunder amounted to the incurring of an obligation under a statute which made incorporators personally liable upon obligations incurred before one-half the stock was subscribed and at least twenty per cent. of the stock paid in.[15]

§ 231. **Incorporation defective.**—Where there is an attempt at incorporation under a general law, but there is a failure to comply with the law in some material respect, this is said to be such want of incorporation that exemption from liability is not thereby secured,[16] and it is generally held that where a corpora-

[9] Stafford Nat. Bank v. Palmer, 47 Conn. 443. See Richardson v. Pitts, 71 Mo. 128.

[10] Myers v. Sturgis, 197 N. Y. 526, 90 N. E. 1162.

[11] McQuiddy Printing Co. v. Head, 7 Ala. App. 384, 62 So. 287; Bond v. Scott Lumber Co., 128 La. 818, 55 So. 468.

[12] John V. Farwell Co. v. Jackson Stores, 137 Ga. 174, 73 S. E. 13.

[13] Hill v. Jackson Stores, 137 Ga. 174, 73 S. E. 13.

[14] Flood v. Busch, 165 Mo. App. 142, 146 S. W. 73.

[15] Zwietusch v. Becker, 153 Wis. 213, 140 N. W. 1056.

[16] Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

tion is defectively organized, the participants are liable as partners for the debts incurred in the corporate name.[17] This principle has found illustration in cases where the articles of incorporation were required to be filed in a certain public office, or that certain securities should be deposited in a public place, and the failure to do so was held to render the stockholders liable as partners for debts contracted before the strict performance of such requirements.[18] So where the corporators failed to state in the articles of incorporation the highest amount of indebtedness or liability which the corporation may incur, as required by statute, the stockholders were held individually liable for the corporate debts, although credit was given to the corporation as such.[19] And where a charter was required to be subscribed by five or more persons, three of whom must be citizens of the state, and duly acknowledged by all, and the charter, or articles of association, was so informally drawn that the court could not say that it was subscribed by any one, and was acknowledged by the required number, it was held that the company had not become incorporated and that the members were liable as partners.[20] The failure to publish the required notice of incorporation has been held not sufficient to render the stockholders immune from liability.[21] And a publication of the articles of incorporation in lieu of the statutory notice was held not to exempt stockholders from individual liability,[22] unless the articles of incorporation contain all that is required to be stated in the public notice.[23]

[17] Central Nat. Bank of Junction City v. Sheldon, 86 Kans. 460, 121 Pac. 340; Ellis v. Brand, 176 Mo. App. 383, 158 S. W. 705; Aehle v. Brand, 176 Mo. 395, 158 S. W. 709.

[18] Harris v. McGregor, 29 Cal. 124; Bigelow v. Gregory, 73 Ill. 197; Hurt v. Salisbury, 55 Mo. 310; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416. But see Granby Min. &c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246.

[19] Heuer v. Carmichael, 82 Iowa 288, 47 N. W. 1034, 9 Ry. Corp. L. J. 274. But see Sweney v. Talcott, 85 Iowa 103, 52 N. W. 106; Thornton v. Balcom, 85 Iowa 198, 52 N. W. 190.

[20] Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85. But see Humphreys v. Mooney, 5 Colo. 282.

[21] Clegg v. Hamilton &c. Grange Co., 61 Iowa 121, 15 N. W. 865; Marshall v. Harris, 55 Iowa 182, 7 N. W. 509.

[22] Clegg v. Hamilton &c. Grange Co., 61 Iowa 121, 15 N. W. 865.

[23] Heuer v. Carmichael, 82 Iowa 288, 47 N. W. 1034, 9 Ry. Corp. L. J.

Where a charter was issued for incorporation, under the laws of Arizona, but no books were opened, no meetings were called and no stock was subscribed or paid, the incorporators were liable as partners.[24] And it has been held that the omission from the articles of incorporation of any of the statutory requirements would render the incorporators personally liable.[25] A stockholder who became such within the three months allowed for the publication of the notice of incorporation was held personally liable for debts contracted within such time, where there was a failure to give the required notice.[26] An association which did business under an unsuccessful attempt to incorporate was held to be a partnership, composed of the directors and of the subscribers to the articles of association.[27] Under the Florida statute stockholders are liable as partners where the incorporation is defective.[28] But an omission of a statutory requirement by the officer in copying the certificate, was held not to render stockholders liable.[29] So the mere failure to keep the books of the corporation in the manner prescribed by statute, was held not to render the stockholders liable for the corporate debts.[30] Neither did the failure to post by-laws as required.[31] Where several persons unite to form a corporation and obtain a certificate of incorporation, inaugurate and conduct the business described, and in the assumed corporate name contract debts in the course of the business as corporate liabilities, they will not be held as partners by reason of a defective organization.[32] Where a statute made stockholders personally liable for failure to take the neces-

274; Thornton v. Balcom, 85 Iowa 198, 52 N. W. 190.

[24] Central Nat. Bank v. Sheldon, 121 Pac. 340, 86 Kans. 460.

[25] Harris v. McGregor, 29 Cal. 124; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85.

[26] Clinton Novelty Iron Works v. Neiting, 134 Iowa 311, 111 N. W. 974.

[27] Coleman v. Coleman, 78 Ind. 344; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668. See Gainey v. Gilson, 149 Ind. 58, 48 N. E. 633.

[28] Heinberg v. Thompson, 47 Fla. 163, 37 So. 71.

[29] Bendall v. Jackson, 11 Pa. Co. Ct. 183, 1 Pa. Dist. R. 726.

[30] Langan v. Iowa &c. Const. Co., 49 Iowa 317.

[31] Mackellar v. Stout, 14 Iowa 359.

[32] Brooke v. Day, 129 Ga. 694, 59 S. E. 769.

sary steps for incorporation, it was held that creditors who were also incorporators were estopped from enforcing the personal liability.[33] A distinction has been made between the cases where, in a suit between a corporation or a stockholder or other individual, the plea of nul tiel corporation is set up to defeat a liability which the one may have contracted with the other, and a case of a suit against individuals who claim exemption from personal liability on the ground of the other having become a corporation. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former.[34] Under the Washington statute, a creditor who has dealt with a corporation may not after recovering judgment against the corporation charge the stockholders as partners with the same debt, unless he alleges and proves a fraudulent intent.[35] The Iowa statute relating to the individual liability of the stockholders of a defectively organized corporation is held not to apply to persons doing business under a company name, where they made no attempt to incorporate and did not assume any corporate functions.[36] Under the laws of Arizona, corporators are individually liable where they accept a charter, though they take no further steps to complete the corporate organization.[37]

§ 232. Capital stock not paid.—According to some statutes the corporators are liable as partners for the corporate debts until the entire capital stock is all paid, and a certificate thereof filed with some designated officer.[38] The personal liability of the

[33] Seaton v. Grimm, 110 Iowa 145, 81 N. W. 225.

[34] Bigelow v. Gregory, 73 Ill. 197; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85. See also Harris v. McGregor, 29 Cal. 124; Mokelumne Hill &c. Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Krutz v. Paola Town Co., 20 Kans. 397; Granby Min. &c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Eaton v. Aspinwall, 19 N. Y. 119; Buffalo &c. R. Co. v. Cary, 26 N. Y. 75.

[35] American Radiator Co. v. Kinnear, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453.

[36] Schumacher v. Sumner Tel. Co. 161 Iowa 326, 142 N. W. 1034.

[37] Central Nat. Bank v. Sheldon, 86 Kans. 460, 121 Pac. 340.

[38] Jos. Rosenheim Shoe Co. v. Horne, 10 Ga. App. 582, 73 S. E. 953; Tibballs v. Libby, 87 Ill. 142; Butler v. Walker, 80 Ill. 345; Norris v. John-

stockholders under such statutes may be attacked, although for other purposes a corporation may have acquired a valid organization;[39] but such a statute was held not to render a contract entered into on the part of the corporation void, but only substituted the personal liabilities of the stockholders for what had not been paid on the capital stock.[40] These statutes have been held to mean that the several stockholders of a corporation are individually liable until the whole amount of the capital stock shall have been paid in, for any debts of the corporation contracted before that time, and that the subsequent paying in of all the stock will terminate the liability. And on this theory where the whole capital stock was paid after an action was brought by a creditor, it was held that the plaintiff could not proceed to judgment.[41] Under a statute making stockholders liable until the entire capital stock was paid, and further providing that it should all be paid within two years, it was held that a creditor was not required to wait until the expiration of the full time before proceeding against a stockholder.[42] The payment of the stock required by these statutes may be either in money or property; but a transfer to the corporation of worthless inventions was held not to relieve a stockholder from personal liability.[43] The failure to divide the capital stock into shares, although the entire amount is fixed, was held insufficient to relieve the individual members from liability for debts contracted by the corporation.[44]

son, 34 Md. 485; Norris v. Wrenschall, 34 Md. 492; Chase's Patent Elev. Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339; First Nat. Bank v. Almy, 117 Mass. 476; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200; Carter v. Samuel Hano Co., 72 N. H. 549, 58 Atl. 243; Veeder v. Mudgett, 95 N. Y. 295; Close v. Potter, 155 N. Y. 145, 49 N. E. 686; Thompson v. Nicolai, 21 Misc. (N. Y.) 700, 49 N. Y. S. 422; Heinze v. South Green Bay &c. Dock Co., 109 Wis. 99, 85 N. W. 145.

[39] Baker v. Backus, 32 Ill. 79.

[40] Chase's Patent Elev. Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339.

[41] Booth v. Campbell, 37 Md. 522.

[42] King v. Duncan, 38 Hun (N. Y.) 461. But see Chase v. Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258.

[43] National Tube-Works v. Gilfillan, 124 N. Y. 302, 26 N. E. 538.

[44] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200; First Nat. Bank v. Almy, 117 Mass. 476.

The theory of this liability is that until the stock is divided and certificates issued the stockholders own the stock in common and are all jointly and severally liable for the debts contracted before the stock is divided.[45] But after a distribution of the shares they are only severally liable, in proportion to the shares held by them respectively.[46] But according to familiar principles stockholders are not to be permitted to set up the want of compliance with statutory requirements in order to escape their personal liability.[47] A stockholder who has paid for his stock was held not personally liable to creditors of the corporation, because it carried on business before the capital stock had all been subscribed, and where it appeared that such stockholder had no notice that the stock had not been subscribed in full, or of any intent to carry on an illegal corporation.[48] But this liability for failure to pay the capital stock does not hold an original stockholder liable for failure of others to pay in an increase of stock.[49] The liability of corporators who transact business as a corporation before the capital stock has been subscribed as required by law is a liability to the creditors and is not an asset of the corporation.[50]

§ 233. Failure to file certificate of incorporation.—The filing of the certificate of incorporation as required by statute in some jurisdictions is regarded as a condition precedent and the failure to file such certificate in the office as required has been held sufficient to render stockholders personally liable for the corporate debts.[51] Failure to file the required certificate of incorporation

[45] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200.

[46] Burnap v. Haskins Steam-Engine Co., 127 Mass. 586.

[47] McDougald v. Bellamy, 18 Ga. 411; McDougald v. Lane, 18 Ga. 444; Hammond v. Straus, 53 Md. 1.

[48] American Mirror &c. Co. v. Bulkley, 107 Mich. 447, 65 N. W. 291.

[49] Sayles v. Brown, 40 Fed. 8; Griffeth v. Green, 129 N. Y. 517, 29 N. E. 838; Veeder v. Mudgett, 95 N. Y. 295.

[50] Wells v. DuBose, 140 Ga. 187, 78 S. E. 715; Rozar v. Rosenheim Shoe Co., 14 Ga. App. 13, 80 S. E. 24.

[51] Jones v. Butler, 146 N. Y. 55, 40 N. E. 633; Jones v. Mail &c. Pub. Co., 80 Hun (N. Y.) 368, 30 N. Y. S. 335, 62 N. Y. St. 61; Christie v. Bowne, 83 Hun (N. Y.) 107, 31 N. Y. S. 390, 63 N. Y. St. 805.

was held sufficient to make the incorporator liable as partner.[52] Under a statute requiring the making of a sworn certificate, it was held that a certificate acknowledged but not sworn to was not a sufficient compliance to relieve the stockholders from personal liability.[53] The failure to file with the secretary of state and with the clerk of the circuit court the duplicate affidavits as required by the statute will make stockholders personally liable.[54] The certificate of payment of the entire capital stock, when filed in accordance with the statute, is held to be conclusive evidence for the purpose of exempting stockholders from liability for debts thereafter contracted.[55] But it seems that it ought not to be more than prima facie evidence.[56] Where a statute required a certificate to be filed in every county where the corporation did business, and it was shown that the required certificate had not been filed in one county where the corporation did business, this was held prima facie evidence that no certificate had been filed.[57]

§ 234. Increase of capital stock without filing certificate. —Where a corporation organized under a special charter increased its capital stock under a general statute, this was held to be such a re-incorporation under the general law that a failure to pay the full amount of such increased capital, and to file a certificate as required by the general law, as to render the subscribers to the increased stock individually liable for the subsequent debts of the corporation.[58] And by this was meant that each stockholder was liable to corporate creditors in a sum equal to the stock taken by him, although he had paid in full for his stock.[59] But the fact of the issue of new stock and the failure to file the required certificate, was held not to revive the individual liability of the holders of the original stock, who had not sub-

[52] New York Nat. Exch. Bank v. Crowell, 177 Pa. St. 313, 35 Atl. 613.

[53] Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354.

[54] Heinberg v. Thompson, 47 Fla. 163, 37 So. 71.

[55] Stedman v. Eveleth, 6 Met. (Mass.) 114.

[56] Veeder v. Mudgett, 95 N. Y. 295.

[57] Maher v. Carman, 38 N. Y. 25.

[58] Tibballs v. Libby, 87 Ill. 142.

[59] Butler v. Walker, 80 Ill. 345.

scribed for any of the increased stock.[60] Under a Maryland statute it was held that until all the increased stock was paid in, the members were severally liable for the corporate debts.[61]

§ 235. Failure to comply with statutory requirements—Effect.—A general statute was held to have a retroactive effect to the extent of making directors and stockholders liable for the debts of a corporation organized under a special charter before its passage, where the capital stock was not fully paid.[62] So such statutes have been held to have an extraterritorial effect, and have been held enforcible by the courts of other states than those in which they were enacted.[64] But in the absence of a statute requiring the payment in full of the capital stock, or of any definite part thereof, there is no personal liability on the part of stockholders for beginning business and contracting debts before the payment of the capital stock.[65] A statute validating charters irregularly acknowledged was held to be valid and did not impair the obligation contracts.[66] In enforcing this personal liability a distinction has been made between corporations attempted to be organized under general laws and those created by special charters.[67] Statutes making stockholders personally liable for corporate debts for failure to comply with such statutory requirements in the organization, are held to relate only to defects in the organization, and not to apply to errors arising from the subsequent conduct of the corporate business.[68] And this lia-

[60] Sayles v. Brown, 40 Fed. 8; Griffeth v. Green, 129 N. Y. 517, 29 N. E. 838.

[61] Booth v. Campbell, 37 Md. 522.

[62] Gulliver v. Roelle, 100 Ill. 141; Black v. Womer, 100 Ill. 328.

[64] Flash v. Conn, 16 Fla. 428, 26 Am. Rep. 721. See Sayles v. Brown, 40 Fed. 8.

[65] Thornton v. Balcom, 85 Iowa 198, 52 N. W. 190; Sweney v. Talcott, 85 Iowa 103, 52 N. W. 106.

[66] Shields v. Cliffton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700.

[67] Bigelow v. Gregory, 73 Ill. 197; Granby Min. &c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416.

[68] Brinkley Car Works &c. Co. v. Curfman, 136 Iowa 476, 114 N. W. 12. Stockholders not individually liable on obligation contracted within three months from the date of the certificate of incorporation during which time the certificate could be published

bility of stockholders can not be enlarged by a failure to keep the corporate books correctly.[69]

§ 236. Extent of stockholders' liability under statutes.— The extent or the amount of the stockholders' liability under the statutes mentioned in the preceding sections is said to be measured by the par value of the stock held by each, and is in no way affected by the amount of the capital stock that may at any time remain unpaid.[70] Thus under a New York statute a stockholder, although his stock was fully paid, was held liable to an amount equal to his stock for all debts contracted while he owned the stock, until the capital stock was fully paid up and the certicate thereof duly filed.[71] And so where a corporation began business upon a less sum than that named in the charter, and afterward became insolvent, the solvent stockholders were held bound to make up the deficiency for the benefit of creditors, that were held liable as partners.[72] But the same court afterward held that in such case the solvent stockholders were not bound to make up the deficiency of insolvent stockholders for the benefit of corporate creditors.[73] And in a case where the stock was not subscribed for up to the minimum amount fixed by the charter, and none was paid in, and the corporation organized, elected themselves officers, began business, contracted debts up to and beyond the nominal capital, they were held to have committed a legal fraud, and were liable to creditors to make good such minimum capital.[74] But the fact that the required capital was paid in was held not sufficient to exonerate the stockholders, where the required certificate was not made and recorded within the prescribed time.[75] While stockholders are made liable by statute as original and principal

under the statutes: Lowden Sav. Bank v. Neiting, 147 Iowa 119, 124 N. W. 185.

[69] Kiggins v. Munday, 19 Wash. 233, 52 Pac. 855.

[70] Rogers v. Gross, 67 Minn. 244, 69 N. W. 894; Norris v. Johnson, 34 Md. 485.

[71] Eaton v. Aspinwall, 19 N. Y. 119.

[72] Haslett v. Wotherspoon, 1 Strob. Eq. (S. Car.) 209.

[73] South Carolina Mfg. Co. v. Bank, 6 Rich. Eq. (S. Car.) 227.

[74] Burns v. Beck, 83 Ga. 471, 10 S. E. 121.

[75] Plass v. Housman, 49 Hun 610 2 N. Y. S. 235, 17 N. Y. St. 671.

debtors, substantially as though they were partners, still the liability of each is limited to a sum equal to the stock held by him.[76] So where two persons own stock jointly, not as partners, neither can be held for more than one-half of the stockholder's liability.[77] And the stockholders' personal liability in banks, extends only to the obligations ordinarily incident to the banking business.[78]

§ 237. Stockholders of de facto corporations not liable—Certificates conclusive.—The individual members of a corporation can not be charged with the value of goods sold and delivered to the corporation on the ground that they were not legally incorporated by reason of noncompliance with certain statutory requirements, when the certificate of incorporation was regular on its face and was authenticated in such manner as to be, by statute, evidence of the existence of the corporation. As against such a certificate the validity of the corporation can not be impeached by proving, as against the certificate, that certain prerequisites of the law had not been complied with.[79] A creditor who has contracted with a de facto corporation in its corporate capacity, and within the scope of its assumed powers, can not deny the corporate existence for the purpose of holding the stockholders liable as partners.[80] Where there was a good-faith attempt to organize a corporation but the articles of association were not filed with the clerk of the county of the corporation's domicile, it was held that persons dealing with the corporation as such, can not object to the irregularity in its organization, in or-

[76] Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797.

[77] Markell v. Ray, 75 Minn. 138, 77 N. W. 788.

[78] Kiggins v. Munday, 19 Wash. 233, 52 Pac. 855.

[79] Laflin &c. Powder Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522.

[80] Snider v. Troy, 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. 887. See also Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Humphreys v. Mooney, 5 Colo. 282; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Planter &c. Bank v. Padgett, 69 Ga. 159; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Sentell v. Hewitt, 50 La. Ann. 3, 22 So. 970; First Nat. Bank v. Almy, 117 Mass. 476; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; Fay v. Noble, 7 Cush. (Mass.) 188, 1 Cumming's Cas. 420; New York Iron Mine v. First Nat. Bank, 39 Mich. 644; Merchants' &c. Bank Co. v. Stone, 38 Mich. 779; Kleckner v. Turk, 45 Nebr. 176, 63

der to charge the directors as partners.[81] But this rule has been held not to apply where the governing statute expressly provided, or clearly indicated, that the stockholders should receive no protection from their organization unless the requirements of the statute have been fully complied with.[82] Where a supposed corporation is doing business as a de facto one, the stockholders can not be held liable as partners, although there have been irregularities, omissions and mistakes in organizing the corporation.[83] Stockholders were held not personally liable because the articles of incorporation, published as the statutory notice, did not show the terms of which the amount of stock authorized, should be paid in, where the notice given showed that the corporation would start business with a certain issue of stock.[84] Where the organization of a corporation had been apparently effected and the secretary of state had returned the charter, with a certificate stating that it had been filed in his office as required, persons who became stockholders in such corporation, under the belief that a legal corporation existed and without any notice of any vice in its charter, were held not liable as partners for the corporate debts.[85] A statute making directors and officers personally liable in case the indebtedness of the corporation should exceed the amount of

N. W. 469; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Second Nat. Bank v. Hall, 35 Ohio St. 158; Rutherford v. Hill, 22 Ore. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. 596.

[81] Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540.

[82] Garnett v. Richardson, 35 Ark. 144; Boyington v. Van Etten, 62 Ark. 63, 35 S. W. 622; Eisfeld v. Kenworth, 50 Iowa 389; Marshall v. Harris, 55 Iowa 182, 7 N. W. 509; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Singer v. Given, 61 Iowa 93, 15 N. W. 858; Heald v. Owen, 79 Iowa 23, 44 N. W. 210; Walton v. Oliver, 49 Kans. 107, 30 Pac. 172, 33 Am. St. 355; American Mirror &c. Co. v. Bulkley, 107 Mich. 447, 65 N. W. 291; Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822; Ferris v. Thaw, 72 Mo. 446; Kleckner v. Turk, 45 Nebr. 176, 63 N. W. 469; Larned v. Beal, 65 N. H. 184, 23 Atl. 149; Smith v. Colorado &c. Ins. Co., 14 Fed. 399.

[83] Seaton v. Grimm, 110 Iowa 145, 81 N. W. 225; McRee v. Quitman Oil Co. (Ga. App.), 84 S. E. 487.

[84] Brinkley Car Works &c. Co. v. Curfman, 136 Iowa 476, 114 N. W. 12.

[85] American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. 743.

its capital stock, was held not to apply on a strict construction to corporations de facto.[86] To constitute a corporation de facto so as to exempt the members from liability as partners, there must be a charter or law under which the corporation could exist with the powers it assumes to exercise, and a colorable compliance with the requirements of the law, together with user of the rights claimed thereunder.[87] A banking company with articles providing for doing a general business which banks are authorized to do, and which did conduct such a business, was held to be a corporation sufficient to charge its stockholders with the statutory liability imposed on them as such.[88] Neither stockholders nor officers and directors of a corporation organized under statute for an educational purpose, are liable as partners for the debts of the corporation.[89] In a collateral suit, one may not assail the existence of a corporation and seek to hold the stockholders as partners who were doing business under the name of a fictitious corporation.[90]

§ 238. Estoppel of creditor contracting with corporation. —On the question of the right of a creditor to hold stockholders individually liable where they have contracted with the corporation as such, the principle of estoppel has more or less weight.[91] This doctrine of estoppel and the right of a creditor to sue the stockholders as partners, was stated by the Alabama court thus: "Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a de facto corporation, as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract, changes the relation from that of stockholders to that of partners; substi-

[86] Kohlsaat v. Gay, 126 Ill. App. 4; Gay v. Kohlsaat, 223 Ill. 260, 79 N. E. 77.

[87] Brown v. Atlanta R. Co., 113 Ga. 462, 39 S. E. 71; Brooke v. Day, 129 Ga. 694, 59 S. E. 769.

[88] Hamilton Nat. Bank v. American Loan &c. Co., 66 Nebr. 67, 92 N. W. 189.

[89] Watton v. Cruce (Okla.), 143 Pac. 1152; Brown v. Cruce (Okla.), 143 Pac. 1154.

[90] O'Kell v. Chama Valley Lands &c. Co., 181 Mo. App. 466, 168 S. W. 887.

[91] Thornton v. Balcom, 85 Iowa 198, 52 N. W. 190. See also Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416.

tutes other and new parties to the contract, and effects the imposition of an enlarged liability, which they did not assume, but intended to avoid, so understood by the creditor, when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle that the corporation and the shareholder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party—the corporation—with which he made the contract, and seeks its enforcement against parties who never entered into contractual relations with him."[92] Many cases hold that persons who have dealt with a corporation as such will not thereafter be permitted to hold the stockholders personally liable as partners, although statutory requirements have not been complied with and there was not in fact a legal organization.[93] A de facto existence for a considerable time will relieve

[92] Snider v. Troy, 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. 887. See also Cory v. Lee, 93 Ala. 468, 8 So. 694; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Mokelumne Hill &c. Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Brooke v. Day, 129 Ga. 694, 59 S. E. 769; Planters' &c. Bank v. Padgett, 69 Ga. 159; Merchants' &c. Bank v. Stone, 38 Mich. 779; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Fox v. McComb, 63 Hun 630, 17 N. Y. S. 783, 44 N. Y. St. 178; Raisbeck v. Oesterricher, 4 Abb. N. Cas. (N. Y.) 444, 55 How. Pr. 516; Methodist &c. Church v. Pickett, 19 N. Y. 482; Second Nat. Bank v. Hall, 35 Ohio St. 158; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1033, 26 Am. St. 743; Harrod v. Hamer, 32 Wis. 162.

[93] Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Stutz v. Handley, 41 Fed. 531; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. 907; Cory v. Lee, 93 Ala. 468, 8 So. 694; Snider v. Troy, 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. 887; Sparks v. Woodstock Iron &c. Co., 87 Ala. 294, 6 So. 195; Bolling v. Le Grand, 87 Ala. 482, 6 So. 332; In re Spring Valley Water Works Co., 17 Cal. 132; Mokelumne Hill &c. Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Bates v. Wilson, 14 Colo. 140, 24 Pac. 99; Humphreys v. Mooney, 5 Colo. 282; Planters' &c. Bank v. Padgett, 69 Ga. 159; Rozar v. Rosenheim Shoe Co., 14 Ga. App. 13, 80 S. E. 24; Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. 230; Bushnell v. Consolidated &c. Mach. Co., 138 Ill. 67,

stockholders from individual liability because of failure to observe statutory requirements, as against creditors contracting with it in such capacity, and relying upon the corporate credit.[94]

27 N. E. 596; Tarbell v. Page, 24 Ill. 46; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. 168 (affg. 62 Ill. App. 49); First Nat. Bank v. Dovetail &c. Gear Co., 143 Ind. 534, 42 N. E. 924; Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Seaton v. Grimm, 110 Iowa 145, 81 N. W. 225; Park v. Zwart, 92 Iowa 37, 60 N. W. 220; First Nat. Bank v. Davies, 43 Iowa 424; Cole v. Great Bend Land &c. Co., 8 Kans. App. 860, 54 Pac. 920; Clark v. Richardson, 17 Ky. L. 514, 31 S. W. 878; Portland &c. Tpk. Co. v. Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. 796; Walton v. Riley, 85 Ky. 413, 3 S. W. 605; Anderson v. Thompson, 51 La. Ann. 727, 25 So. 399; Sentell v. Hewitt, 50 La. Ann. 3, 22 So. 970; Love v. Ramsey, 139 Mich. 47, 102 N. W. 279; American Mirror &c. Co. v. Bulkley, 107 Mich. 447, 65 N. W. 291; Gow v. Collin &c. Lumber Co., 109 Mich. 45, 66 N. W. 676; Merchants' &c. Bank v. Stone, 38 Mich. 779; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Finnigan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. 552; Christian v. Bowman, 49 Minn. 99, 51 N. W. 663; Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. (N. S.) 872; First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761; Reinhard v. Virginia &c. Min. Co., 107 Mo. 616, 18 S. W. 17, 28 Am. St. 441; Granby Min. &c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Larned v. Beal, 65 N. H. 184, 23 Atl. 149; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Raisbeck v. Oesterricher, 4 Abb. N. Cas. (N. Y.) 444, 55 How. Pr. 516; Holmes v. Gilliland, 41 Barb. (N. Y.) 568; People v. Commissioners, 175 N. Y. 516, 67 N. E. 1088 (affg. 81 App. Div. (N. Y.) 242, 81 N. Y. S. 20); Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322n; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Welch v. Importers' &c. Bank, 122 N. Y. 177, 25 N. E. 269; Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; De Witt v. Hastings, 69 N. Y. 518; Nelson v. Luling, 62 N. Y. 645; Merchants' Nat. Bank v. Pendleton, 55 Hun 579, 9 N. Y. S. 46, 29 N. Y. St. 891; Seacord v. Pendleton, 55 Hun (N. Y.) 579, 9 N. Y. S. 46, 29 N. Y. St. 891; Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. Car. 475, 20 S. E. 770; Swofford Bros. Dry Goods Co. v. Owen, 133 Pac. 193, 37 Okla. 616; Patterson v. Franklin, 176 Pa. St. 612, 35 Atl. 205; Allegheny Nat. Bank v. Bailey, 147 Pa. St. 111, 23 Atl. 439; Albright v. Lafayette &c. Sav. Assn., 102 Pa. St. 411; Becket v. Uniontown &c. Loan Assn., 88 Pa. St. 211; Tennessee &c. Lighting Co. v. Massey (Tenn.), 56 S. W. 35; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494; American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. 743; Mitchell v. Jensen, 29 Utah 346, 81 Pac. 165; Marsh v. Mathias, 19 Utah 350, 56 Pac. 1074; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. 933.

[94] Hogue v. Capital Nat. Bank, 47 Nebr. 929, 66 N. W. 1036.

Thus a judgment against an imperfectly organized corporation by a creditor who contracted with it as such, will estop him from thereafter recovering against the members individually as if they were partners on the ground of defective organization.[95] So a creditor who participated in the organization of a corporation, and sold goods to it as a corporation before its organization was completed was estopped to deny the corporation's legal existence to charge the promoters as partners.[96] The same rule applies to one who contracted to purchase stock of a supposed corporation and he can not rescind his contract, and recover from his associates as partners.[97] If persons dealing with a de facto corporation did not know whether it was a corporation or a partnership, they can not hold the directors as partners on the ground that they believed they were dealing with a partnership.[98] But in some states it is held that the fact that creditors dealt with and extended credit to a corporation as such does not estop them from enforcing the personal liability of the stockholders for failure to comply with the statute.[99]

§ 239. Incorporation incomplete—Illustrations of liability.—Corporators and stockholders have been held liable as partners where the organization was incomplete by reason of the failure to comply with some statutory requirement, under certain circumstances as shown in the following illustrations: Publishing the articles of association which did not contain all the requirements

[95] Nebraska Nat. Bank v. Ferguson, 49 Nebr. 109, 68 N. W. 370, 59 Am. St. 522; Richards v. Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822; Shoun v. Armstrong (Tenn. Ch. App.), 59 S. W. 790. See Tilley v. Coykendall, 172 N. Y. 587, 65 N. E. 574.

[96] Western Inv. Co. v. Davis, 7 Ind. Ter. 152, 104 S. W. 573.

[97] Burbank v. Farnham (Mass.), 108 N. E. 492.

[98] Newcomb-Endicott Co. v. Fee, 167 Mich. 574, 133 N. W. 540.

[99] Heinberg v. Thompson, 47 Fla. 163, 37 So. 71; Rhodes v. Hinds, 79 App. Div. (N. Y.) 379, 79 N. Y. S. 437; Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354; Whitney v. Cammann, 137 N. Y. 342, 33 N. E. 305. See also Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790; Heinze v. South Green Bay &c. Dock Co., 109 Wis. 99, 85 N. W. 145.

of the statutory notice;[1] where the certificate of incorporation failed to state the highest amount of indebtedness which the corporation might incur;[2] where a certificate of incorporation was published in a newspaper in a small town remote from the place of the business of the corporation, under a statute providing that the publication should be as convenient as practicable to the principal place of business;[3] where articles of incorporation were signed but were not filed until after debts were contracted;[4] a total failure to file or record the certificate or articles of association;[5] failure to record the certificate in the recorder's office in the proper county;[6] failure to state the number of shares taken;[7] failure to file the certificate;[8] failure to make the required publication;[9] failure to file the certificate with the secretary of state;[10] failure to file the certificate in the county clerk's office;[11] failure to file a copy of the constitution of a society;[12] failure to sign and acknowledge and publish the articles of incorporation;[13] an indefinite statement of the place of business of the corporation;[14]

[1] Clegg v. Hamilton &c. Grange Co., 61 Iowa 121, 15 N. W. 865.

[2] Heuer v. Carmichael, 82 Iowa 288, 47 N. W. 1034.

[3] Berkson v. Anderson, 115 Iowa 674, 87 N. W. 402.

[4] Bigelow v. Gregory, 73 Ill. 197; McVicker v. Cone, 21 Ore. 353, 28 Pac. 76. But see Corey v. Morrill, 61 Vt. 598, 17 Atl. 840; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050.

[5] Garnett v. Richardson, 35 Ark. 144; Coleman v. Coleman, 78 Ind. 344; Field v. Cooks, 16 La. Ann. 153; Ferris v. Thaw, 72 Mo. 446; Martin v. Fewell, 79 Mo. 401; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416.

[6] Guckert v. Hacke, 159 Pa. St. 303, 28 Atl. 249; New York &c. Bank v. Crowell, 177 Pa. St. 313, 35 Atl. 613. See Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Edwards v. Armour Packing Co., 190 Ill. 467, 60 N. E. 807.

[7] Williams v. Hewitt, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. 394.

[8] Hurt v. Salisbury, 55 Mo. 310.

[9] Williams v. Hewitt, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. 394.

[10] Garnett v. Richardson, 35 Ark. 144. See Harrod v. Hamer, 32 Wis. 162; Jones v. Aspen Hardw. Co., 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. 220.

[11] Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362. See Indianapolis Furnace &c. Co. v. Herkimer, 46 Ind. 142.

[12] Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. 85.

[13] Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Unity Ins. Co. v. Cram, 43 N. H. 636. But see Humphreys v. Mooney, 5 Colo. 282.

[14] Harris v. McGregor, 29 Cal. 124.

failure to subscribe and pay the capital stock;[15] an insufficient statement as to the property given in payment of subscriptions;[16] and the recording of the original articles in lieu of a verified copy.[17]

§ 240. No effort to incorporate—Partnership liability.—It scarcely needs judicial authority to the proposition that the assumption of corporate powers without any effort to organize a corporation under existing statutes, will render the persons participating liable as partners.[18] The mere immatured intention to form a corporation, and acting as such, will make the associated parties liable as partners.[19] Where several persons obtained a charter to do a particular business, and then engaged in the business without doing any act indicating an intention to accept the charter, or without colorable compliance with its requirements, or user of the rights therein claimed, they were held to be partners as to creditors who did not deal with them as a corporation. "Unless something is done toward organization, so as to show an intention to conduct the business as a corporation, it will be presumed to be an individual enterprise.[20] So, where the attempted organization never had any appearance of validity, or where the associates incurred liabilities with the knowledge that such attempted incorporation was ineffective they may be held liable as partners.[21] If an association of persons contract in a corporate capacity with a person dealing with it under the belief that it is a corporation, it has been held that the individual mem-

[15] Provident Bank &c. Co. v. Saxon, 116 La. 408, 40 So. 778; Louisiana &c. Bank v. Henderson, 116 La. 413, 40 So. 779. See also National Union Bank v. Landon, 45 N. Y. 410; Ridenour v. Mayo, 40 Ohio St. 9.

[16] Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386.

[17] Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

[18] Richardson v. Keely (Colo.), 142 Pac. 167; Pettis v. Atkins, 60 Ill. 454; Fuller v. Rowe, 57 N. Y. 23.

[19] Queen City Furniture &c. Co. v. Crawford, 127 Mo. 356, 30 S. W. 163.

[20] Brooke v. Day, 129 Ga. 694, 59 S. E. 769.

[21] Gartside Coal Co. v. Maxwell, 22 Fed. 197; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Land Grant Ry. & Trust Co. v. Coffey Co., 6 Kans. 245; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Hill v. Beach, 12 N. J. Eq. 31; Booth v. Wonderly, 36 N. J. L. 250; National

bers are liable as partners.[22] In one state at least it is provided by statute that such pretended corporators shall be individually liable.[23] The privileges accorded to corporators to shield them from personal liability, are obtainable by compliance with statutes authorizing corporations, "but not by simply adopting a supposed corporate name, or by a mere feigned compliance with the laws of the state of which it is claimed the corporation is a citizen.[24] An attempt by pretended corporators to do business under the style of a corporation which had no existence, would render them liable as partners, as the mere name would not relieve them from liability as such.[25] Where there has been no legal incorporation the members are usually individually liable as partners for all the debts. And where the conduct of the parties operates as a fraud or deceit upon third parties, whatever their private intentions may be, the relation of partnership may be said to exist between them with respect to such third person.[26] Where persons subscribed for stock and organized for the transaction of a banking business by the election of directors and officers, intending to incorporate as a bank, and then paid in a part of the capital stock, and conducted the business as a bank, in the belief that they were incorporated, but when in fact there had been no such compliance with the statute as to make such organization even a de facto organization, the persons so interested were held liable as partners for debts contracted by the officers in the due course of business.[27] Pur-

Union Bank v. Landon, 45 N. Y. 410; Second Nat. Bank v. Hall, 35 Ohio St. 158; Medill v. Collier, 16 Ohio St. 599.

[22] Weir Furnace Co. v. Bodwell, 73 Mo. App. 389.

[23] Eisfeld v. Kenworth, 50 Iowa 389; Marshall v. Harris, 55 Iowa 182, 7 N. W. 509; Clegg v. Hamilton, 61 Iowa 121, 15 N. W. 865.

[24] Owen v. Shepard, 59 Fed. 746, 8 C. C. A. 244; Smith v. Standard &c. Mach. Co., 19 Fed. 825, 20 Blatchf. (U. S.) 360; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Hill v. Beach, 12 N. J. Eq. 31; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Booth v. Wonderly, 36 N. J. L. 250. See Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854.

[25] Hyatt v. Van Riper, 105 Mo. App. 664, 78 S. W. 1043; Davidson v. Hobson, 59 Mo. App. 130.

[26] Hyatt v. Van Riper, 105 Mo. App. 664, 78 S. W. 1043.

[27] McLennan v. Hopkins, 2 Kans. App. 260, 41 Pac. 1061. See also Bigelow v. Gregory, 73 Ill. 197; Whipple v. Parker, 29 Mich. 369; Hurt v. Salisbury, 55 Mo. 310; Granby Min.

chasers of the property of a college who took possession and conducted the same in its former corporate name without attempting to incorporate, were held personally liable as partners on a note executed by them in payment of the debts they assumed in the purchase.[28] The officers of a pretended corporation will be held liable as partners for goods purchased in the name of the corporation, and such liability may be enforced in another state, the obligation being contractual.[29]

§ 241. Adventurers not liable as partners.—In some jurisdictions the doctrine that the adventurers of an attempted incorporation are liable as partners is denied on the ground that no such relation or liability was contemplated by them. The rule in such states is that in the absence of a statute making the incorporators personally liable, the only remedy is against the officers or agents who made the contract.[30] On this theory where two or more persons executed and filed articles of incorporation under a general law, but did nothing further toward completing the organization or carrying on the proposed business, they did not thereby become liable as partners where one of them assumed the corporate name and did business and incurred liability thereunder.[31] In New York the associates are not liable unless they have participated in the business otherwise than by signing the

&c. Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Buffalo &c. R. Co. v. Cary, 26 N. Y. 75; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; In re Brown, 106 La. 486, 31 So. 67.

[28] Forbes v. Whittemore, 62 Ark. 229, 35 S. W. 223.

[29] Worthington v. Griesser, 77 App. Div. (N. Y.) 203, 79 N. Y. S. 52.

[30] Blanchard v. Kaull, 44 Cal. 440; Humphreys v. Mooney, 5 Colo. 282; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Canfield v. Gregory, 66 Conn. 9, 33 Atl. 536; Planters' &c. Bank v. Padgett, 69 Ga. 159. See also First Nat. Bank v. Almy, 117 Mass. 476; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Ward v. Brigham, 127 Mass. 24; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; Fay v. Noble, 7 Cush. (Mass.) 188, 1 Cummings Cas. 420; Second Nat. Bank v. Hall, 35 Ohio St. 158; Medill v. Collier, 16 Ohio St. 599; Rutherford v. Hill, 22 Ore. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. 596.

[31] Rutherford v. Hill, 22 Ore. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. 596.

articles of association for the purpose of forming a corporation.[32] In a later case it was held that stockholders were not liable as partners on a contract made after the expiration of the charter by an agent appointed during the life of the corporation, unless they authorized or ratified the same.[33] In some of the states exempting stockholders from this partnership liability, it is conceded that if a single individual assumes to act as a corporation and contracts as such he will be individually liable, and that several persons fraudulently assuming to act as a corporation are individually liable.[34] The general rule is that neither stockholder nor promoter can be held liable as a partner on contracts made or debts incurred by an existing corporation.[35] Justice Brewer said of the principle now under consideration: "I think the rule is this: that where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith, and suppose that they are legally incorporated,—that they are stockholders in a valid corporation,—and where the corporation assumes to transact business for a series of years, and the assumed corporate existence is not challenged by the state, then they can not be held liable as individuals, as members of the corporation.[36]

§ 242. Partnership liability as between associates themselves.—Some of the courts which hold the associates liable as partners to third persons where the statutory requirements have not all been complied with, have gone further and held under such circumstances that the associates stand in the relation of partners to each other in at least two respects: (a) as to their

[32] National Union Bank v. Landon, 45 N. Y. 410; Fuller v. Rowe, 57 N. Y. 23; West Point Foundry Assn. v. Brown, 3 Edw. Ch. (N. Y.) 284; Wells v. Gates, 18 Barb. (N. Y.) 554; Seacord v. Pendleton, 55 Hun (N. Y.) 579, 9 N. Y. S. 46, 29 N. Y. St. 891.

[33] Central City Sav. Bank v. Walker, 66 N. Y. 424.

[34] Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342.

[35] Ryland v. Hollinger, 117 Fed. 216, 54 C. C. A. 248.

[36] Gartside Coal Co. v. Maxwell, 22 Fed. 197.

rights in the common property;[87] (b) as to their liability for contribution to other associates who have paid more than their proportion of the indebtedness.[88] The correctness of this position has been doubted and other courts have denied the partnership relation as among themselves in the absence of an agreement to that effect. The reason given by the Supreme Court of the United States was to the effect that persons can not be made to assume the relation of partners, as between themselves, when their intention is that no partnership shall exist.[89] While such pretended corporators are held individually liable upon contracts authorized by them, it has been said that they are not to be regarded as partners with authority, implied from their relations, in each member to bind all the associates by any act within the scope of the business.[40] The rights of members of an incorporated association are not governed by the rules of law applicable to copartnerships and the members may sue each other for a transaction growing out of the association.[41] In an Indiana case the owners of two lumber companies entered into an agreement to merge their businesses and form a corporation. They never incorporated, but engaged in buying and selling lumber under a name composed of the combined names of the two former companies, and so continued for several months, when they agreed

[87] Stowe v. Flagg, 72 Ill. 397; Flagg v. Stowe, 85 Ill. 164; Factors &c. Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233; African M. E. Church v. New Orleans, 15 La. Ann. 441; Whipple v. Parker, 29 Mich. 369. Persons who purported to constitute themselves a manufacturing corporation, but effected no legal organization, were liable to creditors as partners; and, there being an understanding that profits should be shared equally, are equitably entitled to an equal division on termination of the enterprise. Smith v. Schoodoc Pond Packing Co., 109 Maine 555, 84 Atl. 268.

[88] Flagg v. Stowe, 85 Ill. 164; Richardson v. Pitts, 71 Mo. 128.

[89] Phillips v. Phillips, 49 Ill. 437; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 27 N. E. 596; Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. 168. See also Heald v. Owen, 79 Iowa 23, 44 N. W. 210; Ward v. Brigham, 127 Mass. 24; Allegheny Nat. Bank v. Bailey, 147 Pa. St. 111, 23 Atl. 439; London Assur. Corp. v. Drennen, 116 U. S. 461, 29 L. ed. 688, 6 Sup. Ct. 442.

[40] Johnson v. Corser, 34 Minn. 355, 25 N. W. 799.

[41] Simpson v. Ritchie, 110 Maine 299, 86 Atl. 124.

to settle up the affairs of the business, and dispose of its assets. In an action for an accounting between the alleged partners the court, after stating the essentials of partnership and saying that the only intention necessary is to do those things which constitute a partnership relation, said: "Although the parties originally may have purposed to form a corporation, it is undisputed that no effort was made to carry out that part of their agreement. The evidence does show, however, that pursuant to their contract to merge their business appellant and appellee organized and contributed to a joint venture and operated the same for a period of several months. * * * The fact that one of the parties failed to contribute any or all of his agreed share of the partnership funds is not material, where, as in this case, the evidence is sufficient to sustain a finding that he exercised the rights of a proprietor over the assets which the firm in fact possessed."[41a]

§ 243. Ineffectual organization—When creditor may ignore.—The cases very generally recognize the doctrine that a creditor may ignore the ineffectual efforts of the corporators to organize the corporation, as well as the pretended existence of such a corporation, and proceed directly against the promoters and corporators as partners. In such a case their personal liability may be established in the main by proving that the legal steps necessary for incorporation were never complied with.[42]

§ 244. Partnership liability of promoters and corporators.—Promoters of corporations may be liable as partners under certain circumstances. Such persons become personally liable upon transactions and contracts entered into by them on behalf of the

[41a] Bacon v. Christian (Ind.), 111 N. E. 628 (decided Feb. 25, 1916).

[42] Garnett v. Richardson, 35 Ark. 144; Pettis v. Atkins, 60 Ill. 454; Bigelow v. Gregory, 73 Ill. 197; Coleman v. Coleman, 78 Ind. 344; Field v. Crooks, 16 La. Ann. 153; Vredenburg v. Behan, 33 La. Ann. 627; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Hurt v. Salisbury, 55 Mo. 310; Ferris v. Thaw, 72 Mo. 446; Martin v. Fewell, 79 Mo. 401; Smith v. Warden, 86 Mo. 382; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416.

corporation, in the absence of any exception or condition as to the liability of the corporation when organized.[43] In the absence of an agreement a charter provision that the corporation only shall be liable was held not to deprive the creditor of his right to enforce the personal liability of the promoters.[44] The promoters may escape such personal liability by contracting against it, and the creditor may agree to look to the corporation alone for payment of the debt.[45] The promoters or pretended incorporators may be liable as partners to creditors and not as between themselves.[46] Where the organizers of a corporation agreed to sell stock and lands only to the other members, and that if the other members did not want to buy, then the corporation should be dissolved and liquidated, this did not destroy its character as a corporation or render it a partnership.[47] Members of a partnership, who organized a corporation, for continuing the business, were held personally liable for partnership debts contracted before the organization of the corporation, though the partnership was to last only until the corporation was organized.[48] Where one purchased the interest of a partner in a going firm, the intention being to incorporate the business, but it was not incorporated, and instead business was carried on in the old firm name, the purchaser was held a partner in a new firm.[49] Where promoters who were partners in stock-selling had adjusted all their affairs, an agreement made by one promoter without the other's consent, was not binding on the one not consenting.[50] Corporators are

[43] McRee v. Quitman Oil Co. (Ga. App.), 84 S. E. 487; Landmann v. Entwisle, 7 Exch. 632, 21 L. J. Ex. 208; Rennie v. Clarke, 5 Exch. 292, 19 L. J. Ex. 278; Higgins v. Hopkins, 3 Exch. 163, 18 L. J. Ex. 113, 6 Eng. Railw. Cas. 75.

[44] Witmer v. Schlatter, 2 Rawle (Pa.) 359.

[45] Whitwell v. Warner, 20 Vt. 425. See also Rennie v. Clarke, 5 Exch. 292, 19 L. J. Ex. 278.

[46] Heald v. Owen, 79 Iowa 23, 44 N. W. 210. See London Assur. Corp. v. Drennen, 116 U. S. 461, 29 L. ed. 688, 6 Sup. Ct. 442; Flagg v. Stowe, 85 Ill. 164; Bushnell v. Consolidated &c. Mach. Co., 138 Ill. 67, 27 N. E. 596; Ward v. Brigham, 127 Mass. 24; Richardson v. Pitts, 71 Mo. 128.

[47] In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33.

[48] Broyles v. McCoy, 5 Sneed (Tenn.) 602.

[49] Freeman v. Huttig Sash &c. Co. (Tex.), 153 S. W. 122.

[50] Gray v. Bonnell, 19 Cal. App. 243, 125 Pac. 355.

liable for the corporate debts, where there is no authority under which the organization was attempted, and where there was no proof of user in the state of the attempted creation.[51] The execution of articles of incorporation without filing them, and the statements and beliefs of the promoters that they are a corporation, and the treatment of those as such, was held not sufficient to exempt those who conducted a business under the name of a nonexisting corporation from individual liability for its debts.[52] So an association of persons claiming exemption from liability because of incorporation, as against a creditor, must show compliance with the substantial statutory requisites for the organization of corporations; and among these they must show the statement of the number of shares held by each stockholder, and publication in the mode prescribed by law. Conducting the business in a corporate name, and even assuming to be a corporation de facto, will not relieve the members from individual liability.[53] It has been held that a person who signed an agreement for the lease of a machine from a party with whom he was jointly interested in the formation of a corporation was not liable on the contract as a promoter.[54]

§ 245. Conflicting theories of partnership liability of corporators.—The authorities are not agreed on the question of the liability as partners, or the personal liability, of persons who attempt to organize a corporation, but fail in some essential feature. One class of cases holds such persons acting under a defective organization liable as partners. The rule in this class of cases is that an association doing business under an unsuccessful attempt to incorporate, is deemed to be a partnership composed not only of the directors, but of all the subscribers to the pretended articles.[55] It seems, however, that the weight of author-

[51] Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 232.

[52] Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153.

[53] Williams v. Hewitt, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. 394.

[54] Belding v. Vaughan, 108 Ark. 69, 157 S. W. 400.

[55] Garnett v. Richardson, 35 Ark. 144; Pettis v. Atkins, 60 Ill. 454;

ity, and perhaps the better reasoning, is the other way; and the rule as established by these cases is that where a number of persons sign, acknowledge and file articles of association, and do nothing further toward effecting the organization or carrying on the proposed business, and one or more of such persons assume to do business under the proposed corporate name and incur liability, all the persons signing such articles are not ordinarily liable as partners.[56] It is said in a syllabus written by Judge Sanborn that: "the general rule is that parties who associate themselves together and conduct a business for profit under a name adopted or used by them for that purpose are liable as partners for the debts they incur under that name. This general rule governs if

Bigelow v. Gregory, 73 Ill. 197; Coleman v. Coleman, 78 Ind. 344; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Pape v. Capitol Bank, 20 Kans. 440, 27 Am. Rep. 183; Walton v. Oliver, 49 Kans. 107, 30 Pac. 172, 33 Am. St. 355; Field v. Cooks, 16 La. Ann. 153; Whipple v. Parker, 29 Mich. 369; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Hurt v. Salisbury, 55 Mo. 310; Martin v. Fewell, 79 Mo. 401; Smith v. Warden, 86 Mo. 382; Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Hill v. Beach, 12 N. J. Eq. 31; Hess v. Werts, 4 Serg. & R. (Pa.) 356; Empire Mills v. Alston Grocery Co., 4 Willson Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505, 12 L. R. A. 366n, 9 Railw. Corp. L. J. 294, 33 Am. & Eng. Corp. Cas. 15. See Humphreys v. Mooney, 5 Colo. 282; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Chaffe v. Ludeling, 27 La. Ann. 607; Vredenburg v. Behan, 33 La. Ann. 627; Glen v. Breard, 35 La. Ann. 875; McClinch v. Sturgis, 72 Maine 288; State v. How, 1 Mich. 512; Holbrook v. St. Paul &c. Ins. Co., 25 Minn. 229; Richardson v. Pitts, 71 Mo. 128; National Union Bank v. Landon, 45 N. Y. 410; Fuller v. Rowe, 57 N. Y. 23; Central City Sav. Bank v. Walker, 66 N. Y. 424; Medill v. Collier, 16 Ohio St. 599; Second Nat. Bank v. Hall, 35 Ohio St. 158; Ash v. Guie, 97 Pa. St. 493, 39 Am. Rep. 818; Harrod v. Hamer, 32 Wis. 162; Gartside Coal Co. v. Maxwell, 22 Fed. 197. That corporators are liable as partners to third persons dealing with them before complete incorporation, see Humphreys v. Drew, 59 Fla. 295, 52 So. 362; Ellis v. Brand, 176 Mo. App. 383, 158 S. W. 705; Engvall v. Buchie, 73 Wash. 534, 132 Pac. 231.

[56] Blanchard v. Kaull, 44 Cal. 440; Humphreys v. Mooney, 5 Colo. 282; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Planters' &c. Bank v. Padgett, 69 Ga. 159; First Nat. Bank v. Almy, 117 Mass. 476; Fay v. Noble, 7 Cush. (Mass.) 188, 1 Cumming's Cas. 420; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; Ward v. Brigham, 127 Mass. 24; Central City Sav. Bank v. Walker, 66 N. Y. 424; Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Rutherford v. Hill, 22 Ore. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. 596.

the name used be that of a supposed corporation which the associates have attempted but failed to organize according to law. But a compliance by such associates with the statutes authorizing them to become a corporation exempts them from other individual liability than that prescribed by such laws for debts incurred after they become a corporation authorized to do business as such."[57] Where, however, a person has given the credit to the corporation and not to the stockholders, he may not ordinarily charge them as partners with a corporate debt in the absence of fraud.[58]

§ 246. **Pretended officers liable as partners.**—The statutes of some states make the officers of a pretended corporation, or the persons acting as officers of a corporation, whose legal organization is incomplete, liable as partners without reference to their liability as stockholders. Such statutes make these persons jointly and severally liable for all the debts and liabilities made or contracted by them in the name of the pretended corporation.[59] This liability has been held to attach to such persons by reason of their failure to have recorded the certificate of incorporation.[60] And this liability may be enforced by a corporate creditor who had previously filed his claim with the assignee of an insolvent corporation.[61] And it has been held that such liability was not avoided by proof of the existence of a corporation de facto. A corporation de jure must be shown in order to escape this liability.[62] And this liability may be enforced in the courts of another state.[63]

[57] Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153.

[58] Swofford Bros. Dry Goods Co. v. Owen, 37 Okla. 616, 133 Pac. 193.

[59] Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Edwards v. Armour Packing Co., 190 Ill. 467, 60 N. E. 807; Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 N. E. 496.

[60] Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41.

[61] Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99.

[62] Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. 230; Richardson Fueling Co. v. Seymour, 235 Ill. 319, 85 N. E. 496. See Gunderson v. Illinois Trust &c. Bank, 199 Ill. 422, 65 N. E. 326.

[63] Worthington v. Griesser, 77 App. Div. (N. Y.) 203, 79 N. Y. S. 52.

§ 247. **Partnership liability where incorporation is for unauthorized business.**—The statutes generally state the particular classes of business for which corporations may be organized. And as corporations can not exist without statutory authority, it follows that a corporation can not be legally organized for purposes not authorized by the statute; and an incorporation for an unauthorized purpose is equivalent to no incorporation at all. The rule therefor is that stockholders of a corporation organized for a purpose not authorized by the governing statute will be liable as partners for all debts incurred.[64] Thus persons claiming to incorporate as a bank where no statute authorizes such incorporation were held liable as partners for debts incurred.[65] So where a number of persons attempted to form a corporation to conduct the business of dentistry, where no statute authorized incorporation for such purposes, they could not avoid personal liability for negligence by pleading the incorporation; but each having knowingly and actively participated in conducting the business in violation of law, they were all held liable as partners.[66] So on this theory where directors and stockholders conspired to transact an unlawful business, or business in violation of the charter, they may be held individually liable.[67] Where persons acted as agents of a mutual insurance association, which in fact had no legal existence, they were held personally liable for the performance of contracts executed by them as agents of the pretended corporation.[68] A corporation was held not organized

[64] People v. Rose, 188 Ill. 268, 59 N. E. 432; Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. 326; Isle Royale Land Corp. v. Secretary of State, 76 Mich. 162, 43 N. W. 14; People v. Nelson, 46 N. Y. 477; People v. Gunn, 96 N. Y. 317; State v. Home &c. Union, 63 Ohio St. 547, 59 N. E. 220; Commonwealth v. Alba Dentist Co., 13 Pa. Dist. 432; Lagrone v. Timmerman, 46 S. Car. 372, 24 S. E. 290; Miller v. Tod, 95 Tex. 404, 67 S. W. 483; Mandeville v. Courtright, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. (N. S.) 1003.

[65] Davis v. Stevens, 104 Fed. 235; Mason v. Stevens, 16 S. Dak. 320, 92 N. W. 424.

[66] Mandeville v. Courtright, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. (N. S.) 1003.

[67] Edwards v. Michigan Tontine Inv. Co., 132 Mich. 1, 92 N. W. 491.

[68] Lagrone v. Timmerman, 46 S. Car. 372, 24 S. E. 290.

for unlawful business, so as to make its officers personally liable for money invested in its bonds, because the coupons were to be paid in order of their number, though the scheme adopted would not ordinarily result in all the coupons being paid.[69] Stockholders can not exempt themselves from personal liability by a pretended organization, for one purpose under a statute providing for incorporation for another purpose, where the real purpose was different from the purpose of the statute under which the organization was had.[70] It was held to be no defense to an action against the incorporators of a produce exchange, to recover money deposited as a wager, that the corporation was legally chartered for an apparently lawful purpose, where it appeared that the incorporation was but a cloak to cover illegal acts.[71] But the performance of ultra vires acts by a corporation does not so far invalidate the incorporation as to render its stockholders personally liable.[72] The fact that property purchased by a corporation was subsequently diverted to purposes beyond the scope of its powers, was held not sufficient to make the corporators liable as partners.[73] So the fact that a corporation included in its charter certain enumerated powers in excess of those conferred by statute, was held not to invalidate the charter as to such legitimate powers, and did not render the incorporators liable as partners for an act within its legal powers.[74] A statute authorizing corporations for "literary, scientific and charitable purposes" was held not to authorize the incorporation of a rifle club, and did not protect the members from liability for damages resulting from the negligence of such club.[75] Stockholders have been held personally liable on contracts that were clearly ultra vires the cor-

[69] Vokes v. Eaton, 119 Ky. 913, 85 S. W. 174, 27 Ky. L. 358.

[70] Mohr v. Minnesota Elev. Co., 40 Minn. 343, 41 N. W. 1074.

[71] McGrew v. City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. 771.

[72] Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App.), 56 S. W. 35.

[73] Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App.), 56 S. W. 35.

[74] Shoun v. Armstrong (Tenn. Ch. App.), 59 S. W. 790.

[75] Vredenburg v. Behan, 33 La. Ann. 627. See also Glen v. Breard, 35 La. Ann. 875.

poration.[76] Debts contracted by an incorporated grange in the transaction of mercantile business were held to be outside of the powers conferred by statutes, and imposing a partnership liability on the members.[77]

§ 248. Corporation organized under void or unconstitutional law.—On the principle that every corporation must be authorized by valid statute, it would follow, and the cases so decide, that there can be no valid incorporation under a void or unconstitutional statute. Such a statute does not even form the basis for the existence of a corporation de facto.[78] And it may be stated as a rule that a number of associates who attempt to organize a corporation under a void or an unconstitutional statute may be held personally liable as partners for debts contracted by the association. In holding persons liable under such circumstances the Supreme Court of Michigan said: "The defendants were not a corporation. They had associated together, each sharing the profits and losses of the business equally, according to the money each put in as capital stock, each holding and owning one-third part of the shares. The fact that they took counsel and acted in good faith in organizing under what they were advised was a valid law, does not relieve them of their liability. It is well settled that obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. They have had the benefit of the plaintiff's means; they are indebted to him, as is conceded; but have sought to shift individual liability to a corporate one. There is no such corporation, and the mere fact that defendants assumed to act as such does not relieve them from personal liability. Under the circumstances of this case the defendants must be held liable as partners."[79]

§ 249. Corporation is organized in one state to do business in another state.—Generally incorporators are not

[76] Lehman v. Knapp, 48 La. Ann. 1148, 20 So. 674.

[77] Henry v. Simanton, 64 N. J. Eq. 572, 54 Atl. 153.

[78] See Thomp. Corp., § 232.

[79] Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

liable as partners where they have organized a corporation under the laws of one state but transact all their business in another state. By the comity of states the corporate existence is recognized and the incorporators are protected from personal liability.[80] Texas is perhaps the only state furnishing an exception to this general rule. In that state stockholders are liable as partners in a corporation organized in another state to transact business there, when the statute of Texas does not authorize a corporation for such purpose.[81] But under the laws of Texas the shareholders in a foreign corporation doing business in the state without a license are not liable as partners for the debts of such corporation.[82] In New Jersey it was formerly held that a corporation could not be organized under the laws of New York for the purpose of transacting all its business in New Jersey.[83] But New Jersey has become a favorite resort for the organization of certain classes of corporations that desire to transact all their corporate business in other states, and it seems that the former rule has been abrogated.[84] And in Canada it has been held that no state or country can authorize a corporation to transact business outside of its sovereignty.[85] So where a Texas corporation sought to do business in Louisiana under an assumed name, the stock-

[80] Pennsylvania Co. v. Sloan, 1 Ill. App. 364; Minnesota Gaslight &c. Co. v. Denslow, 46 Minn. 171, 48 N. W. 771; Missouri Lead &c. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746; Merrick v. Van Santvoord, 34 N. Y. 208; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322n; Second Nat. Bank v. Lovell, 13 Ohio Dec. 972, 2 Cin. Super Ct. (Ohio) 397; Second Nat. Bank v. Hall, 35 Ohio St. 158; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. 784; Wright v. Lee, 2 S. Dak. 596, 51 N. W. 706, 4 S. Dak. 237, 55 N. W. 931; New Hampshire Land Co. v. Tilton, 19 Fed. 73; Irvine Co. v. Bond, 74 Fed. 849.

[81] Empire Mills v. Alston Grocery Co., 4 Willson Civ. Cas. Ct. App., § 221, 15 S. W. 200, 505, 12 L. R. A. 366.

[82] A. Leschen &c. Rope Co. v. Moser (Tex. Civ. App.), 159 S. W. 1018.

[83] Hill v. Beach, 12 N. J. Eq. 31.

[84] Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; Stockton v. American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971 (affd. 56 N. J. Eq. 847, 42 Atl. 1117).

[85] Bank of Montreal v. Bethune, 4 U. C. Q. B. (O. S.) 341; Genesee &c. Ins. Co. v. Westman, 8 U. C. (Q. B.) 487; Union India Rubber Co. v. Hibbard, 6 U. C. (C. P.) 77.

holders transacting the business were held liable as partners.[86] Some courts hold that a corporation organized in a different state to transact business outside of the state of its incorporation, for purposes not authorized by the statute of the state of its incorporation, will not be recognized and its stockholders may be held liable as partners. Of this the Supreme Court of Kansas said: "No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured, and do business there, when said first mentioned state will not allow them to do business within its own boundaries.[87] Comity between states will not authorize a foreign corporation to exercise powers within the state which a domestic corporation would not be permitted to exercise under the laws of the state.[88] But in Illinois it was said that in the absence of an express prohibitory statute a corporation legally organized under the laws of another state could do business in the state of Illinois, although such a corporation could not be organized under the laws of that state.[89]

§ 250. Liability for ultra vires acts.—Some difficulty may be experienced in determining the personal or partnership liability of stockholders for the ultra vires acts of the corporation. There are well defined principles, however, that may serve as reasonably accurate guides in circumscribing such liability. A rule that would make stockholders personally liable for every ultra

[86] Campbell v. Campbell Co., 117 La. 402, 41 So. 696.

[87] Land Grant Ry. & Trust Co. v. Coffey, 6 Kans. 245. See generally Taylor v. Branham, 35 Fla. 297, 17 So. 552, 39 L. R. A. 362, 48 Am. St. 249; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 232; North & South Rolling-Stock Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; State v. Topeka Water Co., 59 Kans. 151, 52 Pac. 422; State v. Park Lumber Co., 58 Minn. 330, 59 N. W. 1048, 49 Am. St. 516; State v. Cook, 181 Mo. 596, 80 S. W. 929; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74; Simmons v. Norfolk &c. Steamboat Co., 113 N. Car. 147, 18 S. E. 117, 22 L. R. A. 677, 37 Am. St. 614; Myatt v. Ponca City Imp. Co., 14 Okla. 189, 78 Pac. 185, 68 L. R. A. 810; Lafferty v. Evans, 17 Okla. 247, 87 Pac. 304, 21 L. R. A. (N. S.) 363n.

[88] Clarke v. Central R. &c. Co., 50 Fed. 338, 15 L. R. A. 683.

[89] People v. Fidelity & Casualty Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295.

vires act of the corporation would practically be subversive of the rights of stockholders and destructive to the corporate interest generally. The rule is that the doing of ultra vires acts by the corporation does not render the stockholders personally liable for such acts.[90] On the other hand it seems plain from the cases that stockholders are personally liable where the entire business of a corporation is done either outside of the charter powers, or in violation of law. And yet a distinction seems to be made between the doing of acts simply without authority, and the doing of those acts which are forbidden by law. In the latter class of cases the stockholders are personally liable. The Supreme Court of Ohio after recognizing the distinction suggested said of this subject: "Without undertaking to determine how far the principle may be extended, it is decisive of this case to hold, as we do, that where the entire business carried on by persons in the name of a corporation is such as the corporation is prohibited by law from doing, they can not interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of a corporate name."[91] If the purpose of the proposed incorporation is not authorized by law, or if it is unlawful, the promoters and corporators may be held liable as partners.[92] Thus where a corporation was organized to build and operate a railroad, and to own and operate plantations for the production of cotton, rice and sugar, and it did build and operate a railroad and manage a plantation, but it did also, without authority, manage and operate a store of general merchandise, the officers and stockholders were

[90] Searight v. Payne, 2 Tenn. Ch. 175; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch.), 56 S. W. 35; Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456 (affd. 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. 807).

[91] Medill v. Collier, 16 Ohio St. 599; Second Nat. Bank v. Hall, 35 Ohio St. 158; Mandeville v. Courtright, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. (N. S.) 1003. See also Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346n, 21 Am. St. 846.

[92] Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342. See Fay v. Noble, 7 Cush. (Mass.) 188; 1 Cumming's Cas. 420; Glenn v. Bergmann, 20 Mo. App. 343; Wechselberg v. Flour City Nat. Bank, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470.

held personally liable as partners as to the matters growing out of the merchandise business; and the merchants who sold goods to the corporation in its merchandising business did not thereby preclude themselves from holding the stockholders personally liable after learning that as to such mercantile transactions they were responsible as partners.[93] And stockholders were held liable on the contracts of a corporation which they undertook to form for a certain business, under the laws of another state, solely because a corporation for such purpose could not be legally organized in the state where the business was to be transacted.[94] In Maine stockholders were held personally liable for debts incurred by a manufacturing corporation exceeding in amount the value of its capital invested within the state, or exceeding one-half of its paid-in capital in violation of a statute.[95] The fact that bonds were issued to an amount in excess of the statutory limitation, was held not to show that the action was so entirely void as to render the stockholders individually liable therefor.[96] The mere creation of an indebtedness exceeding two-thirds of the capital stock of the corporation, was held not sufficient to render stockholders personally liable for its debts.[97] The mere fact of the existence of a corporation will not shield the corporators from individual liability in an action based solely on a contract entered into in conducting a business wholly foreign to the object and business of the incorporation, though the business was conducted and the contract entered into in a corporate name.[98] In proceedings to enforce individual liability of stockholders the articles of association are said to be the sole criterion as to the purpose for which the corporation was formed.[99] But corporators were held

[93] Lehman v. Knapp, 48 La. Ann. 1148, 20 So. 674.

[94] Empire Mills v. Alston Grocery Co., 4 Willson Civ. Cas. Ct. App., § 221, 15 S. W. 200, 505, 12 L. R. A. 366n, 9 Railw. & Corp. L. J. 294, 33 Am. & Eng. Corp. Cas. 15.

[95] Lovegrove v. Hunt, 58 Maine 9.

[96] Raymond v. Spring Grove &c. R. Co., 10 Ohio Dec. 416, 21 Wkly. L. Bull. 103.

[97] Langan v. Iowa &c. Const. Co., 49 Iowa 317.

[98] Ridenour v. Mayo, 40 Ohio St. 9. See also Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074.

[99] Senour Mfg. Co. v. Church &c.

individually liable, where the corporation was but a cloak for the purpose of covering up the gaming transactions contemplated in its organization, and followed by it as a business.[1] But a Pennsylvania inferior court held that a person who sold goods for a manufacturing corporation for a store which was run in connection with the corporate business, could not recover against the stockholders as such, although the operation of the store was ultra vires the corporation.[2] The officers and managers of a corporation are not personally liable upon a contract entered into by them while acting for the corporation, on the grounds that the contract was foreign to and independent of the corporate business, and was not a proper or necessary incident thereof.[3] So it has been laid down that the plea of ultra vires can not be availed of to defend against an obligation incurred, when the contract has been in good faith performed by the other contracting party, and the corporation has had the benefit of it.[4] And stockholders are not rendered personally liable for the debts of a corporation merely because its officers conduct an ultra vires business in its name, pursuant to an understanding among the organizers, at the time of the incorporation.[5] The fact that a corporation subsequently engaged in ultra vires transactions did not make stockholders individually liable; and if such contracts amounted to a fraud, it was such as to the state only.[6] The original stockholders, acting within the scope of the guaranteed powers, are not liable for the acts of those who exceed such powers; but the char-

Mfg. Co., 81 Minn. 294, 84 N. W. 109; Spence v. Mobile &c. R. Co., 79 Ala. 576; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221. See generally Cuyler v. City Power Co., 74 Minn. 22, 76 N. W. 948; Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904; Elevator Co. v. Memphis &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798.

[1] McGrew v. City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. 771.

[2] Smucker v. Duncan, 10 Pa. Co. Ct. 430.

[3] Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 472, 33 Am. St. 743, 20 L. R. A. 48.

[4] Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. 743.

[5] Senour Mfg. Co. v. Church &c. Mfg. Co., 81 Minn. 294, 84 N. W. 109.

[6] Senour Mfg. Co. v. Church &c. Mfg. Co., 81 Minn. 294, 84 N. W. 109.

ter will not protect those who embark in, or assent to, unauthorized acts, from personal liability.[7] Stockholders were held not individually liable for deficiency on a purchase money mortgage, where it was not shown that the mortgage was for an indebtedness authorized by the statute.[8] And bank stockholders were not liable for money deposited by one bank in another where a certificate of deposit represented an overdrawn account.[9]

§ 251. Partnership liability imposed by statute.—The statutes of some states impose a partnership or personal liability upon the stockholders of corporations under certain circumstances. Thus under the statute of Massachusetts until the capital stock has been divided into shares the stockholders or members hold the entire amount in common, and may be held individually liable for the debts of the corporation.[10] And where a charter provided that until a certain stated amount of the capital stock was paid the stockholders should be individually liable for the debts of the corporation, the stockholders were held liable to be sued as partners.[11] Usually where the corporation is perfected, but the capital stock not all paid in, the personal liability for the failure to pay is imposed by statute.[12] A statute making stockholders, jointly and severally, personally liable for all debts contracted by such corporation, was held to impose upon the stockholders a greater liability than if they had not been incorporated, because making them severally as well as jointly liable, but in such case the assets of the corporation must be exhausted before proceeding against stockholders.[13]

§ 252. Partnership liability imposed by charter.—Under a charter declaring stockholders liable individually, "in the same

[7] Kearny v. Buttles, 1 Ohio St. 362.

[8] Leighton v. Knapp, 115 N. Y. S. 1040.

[9] State Sav. Bank v. Foster, 118 Mich. 268, 76 N. W. 499, 42 L. R. A. 404.

[10] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 111 Mass. 200; First Nat. Bank v. Almy, 117 Mass. 476.

[11] Perkins v. Sanders, 56 Miss. 733.

[12] See Second Nat. Bank of Cincinnati v. Hall, 35 Ohio St. 158.

[13] Harger v. McCullough, 2 Denio (N. Y.) 119; Moss v. Oakley, 2 Hill (N. Y.) 265; Corning v. McCullough.

manner as carriers at common law for the transportation of all goods," etc.; stockholders were liable as partners, in the same manner and to the same extent as though there had been no corporation.[14] So this liability was imposed by a charter making them personally liable at all times for all debts of the corporation.[15] Where a charter made stockholders personally liable in the event of the insolvency of the corporation, their liability as partners was held to attach when the corporate responsibility failed.[16] So individual liability was imposed by a charter providing that where there was no corporate creditor whereon to levy an execution, the stockholders who were such at the time the contract was made, or liability incurred, should be liable in their own persons and estates as if the contract had been made or liability incurred by them personally.[17]

§ 253. Effect of dealing with a corporation under belief that it was a partnership.—The question has arisen as to the liability of stockholders where a creditor dealt with a corporation believing that he was dealing with a partnership. It may be safely assumed that if the creditor has never before dealt with the corporation as a partnership, and if he has not been led to believe, from statements or conduct of the stockholders, that it was in fact a partnership, it would seem clear that he could not hold the stockholders personally liable merely because of an erroneous or unfounded belief.[18] But if a creditor had aforetimes dealt with the association as a partnership, and if the partnership had become incorporated without notice to him of the change, and it had continued his running account without break, then the creditors could hold the incorporators, the original partners, liable on contracts made after the incorporation. In such cases the corpo-

1 N. Y. 47, 49 Am. Dec. 287, 3 Denio 589, 4 How. Pr. (N. Y.) 182; Moss v. Averell, 10 N. Y. 449.

[14] Allen v. Sewall, 2 Wend. (N. Y.) 327.

[15] Southmayd v. Russ, 3 Conn. 52. See Middletown Bank v. Magill, 5 Conn. 28.

[16] Deming v. Bull, 10 Conn. 409.

[17] New England &c. Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

[18] Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

ration would be estopped to set up its organization as a defense against such a creditor.[19] Where the person in charge of the business represented to the creditor that the association was a partnership and not a corporation and where the creditor had no knowledge of any incorporation but dealt with the association as a partnership, this was held sufficient to make the stockholders liable as partners.[20] Corporate creditors may sue the individual members of a pretended corporation, for the purpose of holding them individually liable, and may question the corporate existence even in a collateral proceeding where no articles of the association were ever subscribed or filed by them.[21] Evidence that the creditor dealt with the company on the representations of one of the members that it was a partnership, was held admissible to show that the creditor was not estopped to deny its corporate existence.[22] Where it appeared that a corporation was organized without capital for the purpose of covering a real partnership, and to permit the carrying on of a partnership business exempt from personal liability, the persons constituting such a company were held personally liable to all who did not deal with it as a corporation, though the incorporation was in fact regular and complete.[23] But notice that certain negotiations had been delayed owing to a reorganization of the company, a partnership, and a subsequent order on a different letterhead showing a corporation, was held to be sufficient notice to the creditor that the partnership had become a corporation and that the members were not personally liable.[24] Where a person loaned money to a grange, without knowl-

[19] Reid v. Kreling, 125 Cal. 117, 57 Pac. 773; Rice v. Patterson, 92 Miss. 666, 46 So. 255; Perkins v. Rouss, 78 Miss. 343, 29 So. 92; Martin v. Fewell, 79 Mo. 401. See Michael v. Davidson, 3 Ga. App. 752, 60 S. E. 362.

[20] Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

[21] Lusk v. Riggs, 70 Nebr. 713, 97 N. W. 1033. See also Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416; Capps v. Hastings Prospecting Co., 40 Nebr. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. 677.

[22] Christian &c. Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 So. 566.

[23] Christian &c. Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 So. 566.

[24] Edwards v. Wheeler, 130 Mich. 219, 89 N. W. 679.

edge of its incorporation, on the credit of the trustees who signed the note, they were held personally liable where there was nothing on the face of the note itself to show an incorporation.[25] The directors of a corporation who, after purchasing its property, carried on business in its name, were liable as partners for goods purchased.[26] The purchasers of a railroad at an execution sale and who continued to run it in the name of the old corporation were held personally liable as partners.[27] Where a creditor seeks to hold members of a corporation personally liable as partners, he is not to be charged with notice that it is a corporation from the name alone.[28] Where a creditor furnished lumber to a bridge company, under the belief that he was dealing with the individuals as a partnership, and without knowledge that it was a corporation, was held sufficient to justify the submission of the question of the personal liability of the stockholders to a jury.[29] It has been held that where a person sold property to an association which he supposed was a partnership, but which was in fact a corporation, he might rescind the contract on the ground that the minds of the parties never met.[30] A person who purchased stock of a supposed corporation, but offered to rescind on learning that there was no valid organization, and who took no part in the management of the affairs of the supposed corporation, was held not liable as a partner.[31]

§ 254. Liability as partners—Burden of proof.—In actions to hold stockholders liable as partners on the ground of non-compliance with statutory provisions, the burden of proof is on the plaintiff to show the want of such compliance.[32] And so where a

[25] Vliet v. Simanton, 63 N. J. L. 458, 43 Atl. 738.

[26] Cummings Mfg. Co. v. Smith (Maine), 93 Atl. 968.

[27] Chaffe v. Ludeling, 27 La. Ann. 607.

[28] Rust-Owen Lumber Co. v. Wellman, 10 S. Dak. 122, 72 N. W. 89. See also People v. Rose, 219 Ill. 46, 76 N. E. 42; Anderson v. Walsh, 189 N. Y. 159, 81 N. E. 764.

[29] Rust-Owen Lumber Co. v. Wellman, 10 S. Dak. 122, 72 N. W. 89.

[30] Consumers' Ice Co. v. Webster, 32 App. Div. (N. Y.) 592, 53 N. Y. S. 56.

[31] Bolton v. Prather, 35 Tex. Civ. App. 295, 80 S. W. 666.

[32] Taylor v. New England &c. Min. Co., 4 Allen (Mass.) 577. See also Abbott v. Omaha Smelting &c. Co., 4 Nebr. 416.

statute made stockholders liable where the entire amount of the capital stock had not been paid at the time a debt was contracted, the burden was said to be on the creditor to prove that the capital stock had not been paid in, although it required him to prove a negative.[33] The burden of proving the fact that a pretended corporation is a partnership is on the creditor seeking to establish such fact, and until such proof is given the corporators are not called upon to make any difference.[34] The reason for this rule as to the burden of proof is that there is no such liability at common law, and the law presumes right and not wrong acting, and accordingly presumes that such a statute has been complied with until the contrary is shown.[35] Not even a prima facie case was made, it was said, by proof that a corporation was organized under a particular name, importing a corporation, with directors and officers, and that the certificates of stock recited an organization under the laws of the state, the division of its capital stock into shares of a stated amount, and that the profits were distributed in dividends.[36] But in one case the burden was said to be on the defendants to prove the existence of the corporation, where, in an action to hold the individuals liable as doing business under a corporate name they denied such individual liability and answered that they were a corporation, and that the services were rendered to it as such.[37]

[33] Chase v. Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258; Bruce v. Driggs, 25 How. Pr. (N. Y.) 71.

[34] Hallstead v. Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370n; Gibb's Estate, In re, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276n.

[35] Chase v. Lord, 77 N. Y. 1, 6 Abb. N. Cas. (N. Y.) 258.

[36] Gibb's Estate, In re, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276n.

[37] Owen v. Shepard, 59 Fed. 746, 8 C. C. A. 244.

CHAPTER X

FIRM NAME—POWERS OF FIRM AS A WHOLE

SECTION

260. Firm name—Not essential.
261. Firm name—Choice, display, failure to choose.
262. Statutory regulation of choice of firm name and registration of partners.
263. What is a fictitious or assumed name within the statutes.
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265. Use of firm name.
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269. Partnerships as parties to deeds.
270. Assumption by firm of partner's individual debts.

§ 260. Firm name—Not essential.—In most cases the members of a partnership do business under a certain name or style which represents or designates the association, and is intended, when used in executing a contract, to bind the partnership and its members. This is known as the firm name. The use of a shortened or symbolic name undoubtedly arose from convenience, it being easier for one partner, as agent for all, to sign an abbreviated name than to sign the full names of the partners. Indeed, the term firm, ordinarily used to designate a partnership, is derived from the Latin "firma," a signature, and the use of the abbreviated signature or "firma," seems to have transferred the term which means signature to the association of persons for whom the signature stood. A symbolical firm name, although desirable almost to the point of necessity,[1] is not one of

[1] A firm name is "simply a convenient abbreviation of their two names, and when used had the same effect as if no firm name had been adopted and the name of each partner had been signed in full as a partner; and it bound each only because he had adopted it as his name, and authorized its use for the purposes for which it was used." Haskins v.

the essentials of a partnership,[2] since the firm may, on occasion, be bound, in most jurisdictions at least, by the employment by one partner, either of his individual name alone,[3] or of it and the names of his copartners.[4] "The adoption of a firm name is

D'Este, 133 Mass. 356. See further, Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40.

[2] Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391; Pursley v. Ramsey, 31 Ga. 403; Kitner v. Whitlock, 88 Ill. 513; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Robertson v. De Lizardi, 4 Rob. (La.) 300; Haskins v. D'Este, 133 Mass. 356; Getchell v. Foster, 106 Mass. 42; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Ontario Bank v. Hennessey, 48 N. Y. 545; Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216. See Stickney v. Smith, 5 Minn. 486 (Gil. 390). See also McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Austin v. Williams, 2 Ohio 61.

[3] Willet v. Chambers, Cowp. 814; Tomlins v. Lawrence, 3 M. & P. 555; Horton v. Miller, 84 Ala. 537, 4 So. 370; Snead v. Barringer, 1 Stew. (Ala.) 134; Brown v. Lawrence, 5 Conn. 397; Dougal v. Cowles, 5 Day (Conn.) 511; Byington v. Gaff, 44 Ill. 510; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Caldwell v. Sithens, 5 Blackf. (Ind.) 99; Theilen v. Hann, 27 Kans. 778; Fairs v. Cook, 110 Ky. 867, 23 Ky. L. 328, 62 S. W. 1043, 63 S. W. 600, 23 Ky. L. 328; Hermann v. Louisiana State Ins. Co., 8 La. 285; Getchel v. Foster, 106 Mass. 42; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Gilroy v. Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. S. 138; Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. S. 753; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Ontario Bank v. Hennessey, 48 N. Y. 545; Sage v. Sherman, 2 N. Y. 417; Graeff v. Hitchman, 5 Watts (Pa.) 454; Puckett v. Stokes, 2 Baxt. (Tenn.) 442; Gavin v. Walker, 14 Lea (Tenn.) 643; Dockery v. Faulkner (Tex. Civ. App.), 101 S. W. 501; Sloo v. Powell, Dal. Dig. (Tex.) 467; Burnley v. Rice, 18 Tex. 481; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630, Fed. Cas. No. 16872; Salt Lake Brewing Co. v. Hawke, 24 Utah 199, 66 Pac. 1058; Kyle v. Connelly, 3 Leigh (Va.) 719. See also Mifflin v. Smith, 17 Serg. & R. (Pa.) 165. Likewise an individual partner's name to which is added the suffix "& Co.," may be effective to bind the firm. Drake v. Elwyn, 1 Caines (N. Y.) 184; Aspinwall v. Williams, 1 Ohio 84; Austin v. Williams, 2 Ohio 61. See in this connection Baring v. Crafts, 9 Metc. (Mass.) 380; Crum v. Abbott, 2 McLean (U. S.) 233, Fed. Cas. No. 3454. This is also true of a partner's name and the sufflx "as trustee." Morse v. Richmond, 97 Ill. 303. See also Mick v. Howard, 1 Ind. 250, Smith (Ind.) 160. But see Fair v. Citizens' State Bank, 9 Kans. App. 779, 59 Pac. 43; Clark v. Houghton, 12 Gray (Mass.) 38; Reevs v. Hardy, 7 Mo. 348; Farmers' Bank v. Bayless, 35 Mo. 428; Marvin v. Buchanan, 62 Barb. (N. Y.) 468; Dickinson v. Legare, 1 Desaus. (S. Car.) 537; Smith v. Hoffman, 2 Cranch (U. S.) 651, Fed. Cas. No. 13061; Jones v. Anderson, 7 Leigh (Va.) 308.

[4] "There is an established principle that any partner may execute a valid mortgage of partnership goods as

largely for convenience in making contracts binding on all the members by its use, thus obviating the necessity of securing the individual assent of and execution by each of the partners, which, when the members are numerous, might not only be inconvenient, but sometimes impracticable."[5] Further, a single firm may have more than one name, which, when used, will have a binding effect.[6]

§ 261. Firm name—Choice, display, failure to choose.—The power of a partnership to choose a name, although comprehensive, is not altogether unlimited. While the name is entirely a matter of convention,[7] and, generally speaking, may be whatever the partners may choose to make it,[8] either entirely fanci-

security for a partnership debt by signing the firm name or the individual names of the members of the firm, and it is immaterial whether he sign the name of each copartner separately or sign the firm name, and the addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary. Jones on Chattel Mortgages, § 46. The learned author, in the further discussion of this principle, lays it down that, although one partner signs the names of the several individuals composing the firm, the acquiescence of the other partners in such a transaction would place the validity of it beyond question, and it does not matter whether the acquiescence be given at the time of the transaction or subsequently." Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669. See further per Maule, J., in Norton v. Seymour, 3 C. B. 792. See also Kitner v. Whitlock, 88 Ill. 513; Iddings v. Pierson, 100 Ind. 418; Mick v. Howard, 1 Ind. 250, Smith (Ind.) 160; Getchell v. Foster, 106 Mass. 42; Patch v. Wheatland, 8 Allen (Mass.) 102; Holden v. Bloxum, 35 Miss. 381; Richardson v. Huggins, 23 N. H. 106; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Walker v. Dickerson, 3 N. Car. 23; Crozier, Rhea & Co. v. Kirker, 4 Tex. 252, 51 Am. Dec. 724. And compare Gay v. Johnson, 45 N. H. 587; Crouch v. Bowman, 3 Humph. (Tenn.) 209.

[5] Meier v. First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907.

[6] Hunt v. Semonin, 79 Ky. 270, 2 Ky. L. 334; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Michael v. Workman, 5 W. Va. 391. See also Holland v. Long, 57 Ga. 36; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Brown v. Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

[7] Edgerton v. Preston, 15 Ill. App. 23.

[8] Maugham v. Sharpe, 17 C. B. (N. S.) 443, 112 E. C. L. 443; Haskins v. D'Este, 133 Mass. 356; Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177 (revg. 31 N. Y. Super. Ct. 426); Nichols v. White, 41 Hun (N. Y.) 152, 3 N. Y. St. 784 (affd. 114 N. Y. 639, 21 N. E. 1120); Walker v.

ful,[9] one appropriate to a corporation,[10] inclusive of the names of none, some or all of the members of the firm,[11] or constituted of the name of a single partner,[12] of an agent,[13] or of a deceased person,[14] the power of choice must invariably be exercised in such a way that neither the owner of any other trade name nor the public can afterward complain of fraud,[15] and also, in compliance with reg-

Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40. And see Union Brewing Co. v. Inter State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997.

[9] Kahn v. Thomson, 113 Ga. 957, 39 S. E. 322; Lauferty v. Wheeler, 11 Daly (N. Y.) 194, 63 How. Pr. (N. Y.) 488; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533.

[10] Whitt v. Blount, 124 Ga. 671, 53 S. E. 205; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928; Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030.

[11] Shain v. DuJardin, 105 Cal. xvii, 38 Pac. 529; Crawford v. Collins, 45 Barb. (N. Y.) 269, 30 How. Pr. (N. Y.) 398.

[12] "The firm name is such as the copartners choose to adopt. It may disclose the names of all the partners or of none of them, or the name of but one of them may be used as the firm name." Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569. See also Kirk v. Blurton, 9 M. & W. 284; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216; Palmer v. Stephens, 1 Den. (N. Y.) 471; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; Williams v. Gillies, 53 How. Pr. (N. Y.) 429 (affd. 13 Hun (N. Y.) 422, and revd. 75 N. Y. 197); Martin v. Johnson, 8 Daly (N. Y.) 541; Yorkshire Banking Co. v. Beatson, 5 C. P. D. 109, 49 L. J. C. P. 380, 42 L. T. 455, 28 Wkly. Rep. 879; Masters v. Brooks, 132 App. Div. (N. Y.) 874, 117 N. Y. S. 585; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

[13] Rochester Bank v. Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

[14] "Partnerships are sometimes carried on under the name of persons who are dead, but who, in their lifetime, had established an extensive business and a high reputation for integrity and fidelity in trade." Oppenheimer v. Clemmons, 18 Fed. 886.

[15] Merchant Banking Co. of London v. Merchants' Joint Stock Bank, 9 Ch. Div. 560; Holloway v. Holloway, 13 Beav. 209; Lee v. Haley, L. R. 5 Ch. 155; Croft v. Day, 7 Beav. 84; L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242; Frazer v. Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. 73; Bininger v. Clark, 60 Barb. (N. Y.) 113, 10 Abb. Pr. (N. S.) (N. Y.) 264; Adams v. Brown, 16 Ohio St. 75. But see Burgess v. Burgess, 3 De Gex, M. & G. 896; Lawson v. Bank of London, 18 C. B. 84, 25 L. J. C. P. 188; Levy v. Walker, 10 Ch. Div. 436; Rogers v. Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78; Russia Cement Co. v. La Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. 685; Will-

ulative statutes.[16] Even when a firm name has not been provided for in the articles of association, it still may exist as the result of either a subsequent agreement or acquiescence,[17] or the custom of the partnership and the latter's manner of conducting the business.[18] "It is not necessary that a firm name should be inserted in the articles of partnership. The name in which their business is done, and by which they are generally known, becomes legitimately the firm name."[19] It has been held, however, that if a name has been selected as the one in which the business of the firm is to be conducted, it is not subject to change except with the consent of all the partners.[20] Where a business is carried on in the name of one partner and he carries on no other business, it is held that the presumption arises that negotiable instruments signed in such name were intended to bind the firm, such presumption being based on expediency and casting the burden on the other partners of showing such contract was intended to bind the individual partner only.[21] This presumption does not arise if the partner whose name is used also carries on a separate business for himself.[22]

§ 262. Statutory regulation of choice of firm name and registration of partners.—There are statutes in several states which usually provide a penalty for violation and prohibit the use in a firm name of the name of any person not actually a

iams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; MacDonald v. Trojan Button Fastener Co., 9 N. Y. S. 383, 29 N. Y. St. 867 (affd. 56 Hun (N. Y.) 648, 31 N. Y. St. 374, 10 N. Y. S. 91).

[16] See post § 262.

[17] Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

[18] Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

[19] Pursley v. Ramsey, 31 Ga. 403.

[20] Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391; Palmer v. Stephens, 1 Den. (N. Y.) 471; Tilford v. Ramsay, 37 Mo. 563; Tams v. Hitner, 9 Pa. St. 441; Moffat v. McKissick, 8 Baxt. (Tenn.) 517.

[21] Yorkshire Banking Co. v. Beatson, L. R. 5 C. P. D. 109, 49 L. J. C. P. 380; Swan v. Steele, 7 East 209; Emly v. Lye, 15 East 7; Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165.

[22] United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791.

partner, or the use of the designation "and company" or "& Co.," except to represent an actual partner or partners.[23] Further, there are some states which require a partnership, upon the choice of a fictitious or assumed name to which is added the suf-

[23] For example: Georgia Code, 1911, vol. 1, § 3165: "No partnership may lawfully insert in their firm name or style the name of any individual not actually a copartner, nor continue in such firm name or style the name of a retired partner. And each member of the firm violating this provision shall forfeit the sum of $100 for every day's violation, to be recovered by any person who may prosecute for the same." Hurd's Rev. Stat. (Ill.), 1908, p. 756, § 220, penalizes assumption of corporate name by an unincorporated association. Const. & Rev. Laws of La., 1904, vol. 2, p. 1218, §§ 2668, 2669: "Hereafter no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and Company' or '& Co.' is used, it shall represent an actual partner or partners."

"Any person offending against the provisions of the foregoing section, shall, upon conviction thereof, be deemed guilty of a misdemeanor and be punished by a fine not exceeding one thousand dollars, recoverable before any court of competent jurisdiction." See Wolfe v. Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Kent v. Mojonier, 36 La. Ann. 259. In the matter of the Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427. Rev. Laws of Mass., 1902, vol. 1, p. 620, § 5: "A person who carries on business in this commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives." See Bowman v. Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55; Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001; Martin v. Bowker, 163 Mass. 461, 40 N. E. 766; Lodge v. Weld, 139 Mass. 499, 2 N. E. 95; Hallett v. Cumston, 110 Mass. 29; Morse v. Hall, 109 Mass. 409; Rogers v. Taintor, 97 Mass. 291. Consol. Laws of New York, 1909, p. 3734, § 22: "No person shall hereafter transact business in the name of a partner not interested in his firm, and when the designation 'and company' or '& Co.' is used, it shall represent an actual partner; but a violation of this section shall not be a defense in an action or proceeding brought by an assignee for the benefit of creditors or by a receiver of the property of or by an executor or administrator of a person who has violated the same." Page 3903, § 924: "A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation 'and company' or '& Co.' when no actual partner is represented thereby is guilty of a misdemeanor. But this section does not apply to any case where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person." See Kennedy v. Budd, 5 App. Div. (N. Y.) 140, 39 N. Y. S. 81;

fix "and Company" or "& Co.," to file and publish a certificate containing the full individual names of the separate members of the firm,[24] and others which make necessary for specified purposes the display of a sign divulging the identity of those having an interest in the business.[25] Acts providing for the registration of

Loeb v. Firemen's Ins. Co., 78 App. Div. (N. Y.) 113, 79 N. Y. S. 510, 12 N. Y. Ann. Cas. 343; Donlon v. English, 89 Hun (N. Y.) 67, 35 N. Y. S. 82, 2 N. Y. Ann. Cas. 299, 69 N. Y. St. 260; Vandergriff v. Bertron, 83 App. Div. (N. Y.) 548, 82 N. Y. S. 153; Rosenheim v. Rosenfield, 59 Hun (N. Y.) 625, 37 N. Y. St. 550, 13 N. Y. S. 720; Cahn v. Gottschalk, 16 N. Y. St. 818, 2 N. Y. S. 13, 14 Daly (N. Y.) 542; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286; Cody v. Dempsey, 86 App. Div. (N. Y.) 335, 83 N. Y. S. 899, 13 N. Y. Ann. Cas. 322; McArdle v. Thames Iron Works, 96 App. Div. (N. Y.) 139, 89 N. Y. S. 485; Slater v. Slater, 78 App. Div. (N. Y.) 449, 80 N. Y. S. 363; Zimmerman v. Erhard, 83 N. Y. 74, 60 How. Pr. (N. Y.) 163, 38 Am. Rep. 396; Castle v. Graham, 180 N. Y. 553, 73 N. E. 1120; Jenner v. Shope, 67 Misc. (N. Y.) 159, 121 N. Y. S. 599; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Lane v. Arnold, 11 Daly (N. Y.) 293, 13 Abb. N. Cas. (N. Y.) 73 (revd. 99 N. Y. 648); Stoddart v. Key, 62 How. Pr. (N. Y.) 137; O'Toole v. Garvin, 1 Hun (N. Y.) 92, 3 Thomps. & C. (N. Y.) 118. Okla. Compiled Laws (1909), p. 645, § 2444: "Every person transacting business in the name of a person as a partner who is not interested in his firm, or transacting business under a firm name in which the designation 'and company' or '& Co.' is used without representing an actual partner except in cases in which the continued use of a copartnership name is authorized by law, is guilty of a misdemeanor."

[24] For example: Cal. Civil Code (1906), §§ 2466, 2467. See Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811; Gray v. Wells, 118 Cal. 11, 50 Pac. 23; North v. Moore, 135 Cal. 621, 67 Pac. 1037; Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; 25 Del. Laws, ch. 146; State v. Ferschke, 2 Boyce (Del.) 477, 81 Atl. 401; Supp. to Rev. Laws of Mass., 1902-1908, pp. 575, 576; Cobbey's Ann. Stat. of Nebr. (1911), § 9700; Consol. Laws of New York (1909), p. 3733, § 21; Rev. Codes of N. Dak. (1905), §§ 5858, 5859; Rev. Stat. of Ohio, §§ 3170-6; Cincinnati Traction Co. v. Hulvershorn, 31 Ohio C. C. 444; Compiled Laws of Okla. (1909), p. 1132, §§ 5023, 5024; Rem. & Bal. Code Wash., §§ 8369, 8372; Hale v. City Cab &c. Co., 66 Wash. 459, 119 Pac. 837. See Swope v. Burnham, 6 Okla. 736, 52 Pac. 924; Rev. Code of S. Dak. (1903), p. 802, §§ 1762, 1763; Bovee v. De Jong, 22 S. Dak. 163, 116 N. W. 83; and Gen. Code of Ohio (1900), §§ 8099-8105. See also Cobble v. Farmers' Bank, 63 Ohio St. 528, 59 N. E. 221.

[25] For example: Mississippi Code of 1892, § 4234. See Dale v. Harrahan, 85 Miss. 49, 37 So. 458; Rev. Stat. of S. Car. (1893), § 1432; Kaufman v. Carter, 67 S. Car. 312, 45 S. E. 211.

the names of the members of partnerships do not violate constitutional rights respecting private property,[26] nor are they an unreasonable exercise of the police power.[27]

§ 263. What is a fictitious or assumed name, within the statutes.—It is held in Michigan that under the statute,[28] the adoption by a firm composed of brothers of their surname followed by the word "Brothers" as a firm name is not the adoption of an assumed name, and the brothers may sue as partners.[29] The same rule holds in Montana,[30] in New York,[31] and in Oklahoma, where it was held that the name "Patterson Furniture Co." applied to a partnership in which Patterson is the surname of all the partners is not a fictitious name since it discloses the true names of all the partners.[32] The contrary rule holds in California, where it is held that a name composed of a surname followed by "Bros." is not a sufficient designation to dispense with filing a certificate.[33] In Ohio there are conflicting decisions.[34] The use of the surname of one partner followed by "& Co." is held not to be the use of an assumed name, in Michigan,[35] and the same has been held as to the use of the real name of one partner, followed by & Son,"[36] or the full name of one of three brothers, partners, followed by "and company."[37] In California it is sufficient if the surnames are given.[38] The firm name, "Lamberson &

[26] State v. Ferschke, 2 Boyce (Del.) 477, 81 Atl. 401.

[27] State v. Ferschke, 2 Boyce (Del.) 477, 81 Atl. 401.

[28] Mich. Pub. Acts 1907, No. 101.

[29] Cross v. Leonard, 181 Mich. 24, 147 N. W. 540.

[30] Vaughan v. Kujath, 120 Pac. 1121, 44 Mont. 484; Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566.

[31] "Castle Brothers" is not an assumed name. Castle v. Graham, 87 App. Div. 97, 84 N. Y. S. 120 (affd. 180 N. Y. 553, 73 N. E. 1120).

[32] Patterson v. Byers, 17 Okla. 633, 89 Pac. 1114, 10 Am. Cas. 810.

[33] North v. Moore, 135 Cal. 621, 67 Pac. 1037.

[34] Doob v. Lovell Mfg. Co., 4 Ohio Dec. 189 (holds certificate must be filed); Cochran v. Hirsch, 6 Ohio Dec. 41 (holds filing of certificate unnecessary).

[35] Zemon v. Trim, 181 Mich. 130, 147 N. W. 540.

[36] Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418.

[37] Sauer v. McClintic Marshall Const. Co., 179 Mich. 618, 146 N. W. 422.

[38] McLean v. Crow, 88 Cal. 644, 26 Pac. 596; Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659.

Lamberson" is not fictitious nor does it fail to show the names of the parties,[39] or the name, "Hale-Tindall Co.," which contains the names of all the partners.[40] The rule as to the registration of a name by the members of a partnership does not apply to an individual doing business under an assumed or trade-name.[41] There is a New York statute which prohibits the transaction of business in the name of a partner not interested in the firm, and that if the designation "& Co." or "and Company" is used, it shall represent an actual partner or partners.[42] Under this statute the use of the name, "J. & Co." by one who had no partner, was held illegal.[43] But a husband and wife may do business as "J. Zimmerman & Co.," for the wife is an actual partner designated by "& Co.," although under a disability.[44] Nor does the use by a single person of the name "Alderney Manufacturing Company" violate this statute.[45] But it is violated by a firm doing business as "Lunt Bros." when only one partner is named Lunt.[46]

§ 264. Validity of contract under assumed name in violation of statute.—Most statutes requiring the registration or filing and publishing a certificate giving the names and addresses of members of partnerships doing business under assumed or fic-

[39] Lamberson v. Bashore, 167 Cal. 387, 139 Pac. 817.

[40] Hale v. City Cab &c. Co., 66 Wash. 459, 119 Pac. 837.

[41] Merrill v. Caro Inv. Co., 70 Wash. 482, 127 Pac. 122; Oklahoma Fire Ins. Co. v. Wagester, 38 Okla. 291, 132 Pac. 1071; Bixley v. Sharp, (Okla.), 146 Pac. 21; Robinovitz v. Hamill (Okla.), 144 Pac. 1024, L. R. A. 1915 D 981 and note. The use in one instance by K. of the name of "K. Brothers" in making a contract did not prevent K. from suing thereon, though he had not filed the certificate required by Rev. Codes (Mont.), § 5509. Keffler v. Wilds (Mont.), 146 Pac. 1103.

[42] Laws 1833, ch. 281, as amended by Laws 1886, ch. 262, now Partnership Law, § 22; Partnership Law of 1897, §§ 20, 21, and Pen. Code, § 363, 1881, not repealed by Pen. Code, § 363b, Laws 1900, ch. 216.

[43] Jenner v. Shope, 205 N. Y. 66, 98 N. E. 325 (affg. order 140 App. Div. 911).

[44] Zimmerman v. Erhard, 83 N. Y. 74, 60 How. Pr. 163, 38 Am. Rep. 396.

[45] Lauferty v. Wheeler, 11 Daly (N. Y.) 194, 63 How. Pr. (N. Y.) 488.

[46] Lunt v. Lunt, 8 Abb. N. Cas. (N. Y.) 76.

titious names, provide that such a partnership has no right to bring an action on a contract until it has filed and published the required certificate.[47] In Illinois such a contract is not void.[48] And it is generally held not necessary to the validity of the contract that the certificate was filed when the contract was made, but that it is sufficient if it was filed before suit was brought.[49] It is also said that when at any time the firm complies with the statute, capacity to sue attaches, for the contract was not invalid,[50] and that a firm may comply with the statute after beginning suit and before trial, and thus may maintain the suit begun.[51] It was held in Ohio that the failure of a partnership doing business under a fictitious name, to file its certificate with the county clerk within four years of bringing an action to recover damages for a tort, does not bar the action.[52] The theory of the cases holding as above, is that the failure to file the certificate is an affirmative defense, not a disability of the plaintiff, thus, ordinarily, it is held a defendant must take advantage of the fact that a partnership has not complied with the statute as to registering an assumed name, by demurrer, answer or similar plea, or the objection is waived.[53] And it is usually held that, although a partnership may be prevented from suing on a contract

[47] North v. Moore, 135 Cal. 621, 67 Pac. 1037; Wallbrecht v. Blush, 43 Colo. 329, 95 Pac. 927; Hunter v. Patterson, 162 Ky. 778, 173 S. W. 120, L. R. A. 1915 D 987 and note; Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857; Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C 697; Vaughan v. Kujath, 44 Mont. 484, 120 Pac. 1121; Walker v. Stimmel, 15 N. Dak. 484, 107 N. W. 1081; Cobble v. Farmer's Bank, 63 Ohio St. 528, 59 N. E. 221; Smith v. Woods, 33 Okla. 233, 124 Pac. 1088; Robbins v. Vandermaiden (Mich.), 148 N. W. 747.

[48] Turnes v. Johnson, 179 Ill. App. 32.

[49] Sutton v. Coast Trading Co., 49 Wash. 694, 96 Pac. 428.

[50] Heegaard v. Dakota L. & T. Co., 3 S. Dak. 575, 54 N. W. 656; Bovee v. De Jong, 22 S. Dak. 163, 116 N. W. 83.

[51] Reilly v. Hatheway, 46 Mont. 1, 125 Pac. 417; Bleecker v. Miller, 40 Okla. 374, 138 Pac. 809.

[52] Cincinnati Traction Co. v. Hulvershorn, 31 Ohio C. C. 444.

[53] Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955; Turnbull v. Michigan Cent. R. Co. (Mich.), 150 N. W.

because of its failure to comply with the statute as to the use of fictitious names, its assignee may sue, since the contract is not considered void in these jurisdictions.[54] The contrary is also held.[55] The New York statute, which provides a penalty for doing business in the name of a nonexisting partner, is construed as designed to protect persons giving credit to the firm on the strength of the fictitious firm name and as it is not needed to protect those obtaining credit from the firm, the statute does not prevent one doing business in its violation from recovering on contracts.[56] There were some earlier New York cases holding a contrary view, that a contract by one doing business in violation of the statute above mentioned was void.[57] The present New York rule applies in Louisiana,[58] New Jersey,[59] Connecticut[60] and British Columbia.[61] Nor, it is held, does the failure of partners to file a certificate required of persons doing business under a name other than their own, make their business illegal, or deprive them from their right to exemption in bankruptcy.[62] The mere failure to publish the acknowledgment to the required

132; Calvert v. Newberger, 11 Ohio Cir. Dec. 184, 20 Ohio Cir. Ct. 353; Hale v. City Cab &c. Co., 66 Wash. 459, 119 Pac. 837.

[54] Cheney v. Newberry, 67 Cal. 126, 7 Pac. 445; Trudel v. Butori, 19 Cal. App. 584, 127 Pac. 76; Standard Sewing Mach. Co. v. New State Shirt & Overall Mfg. Co., 42 Okla. 554, 141 Pac. 1111; even though assignee is a member of firm, Gray v. Wells, 118 Cal. 11, 50 Pac. 23.

[55] Choctaw Lumber Co. v. Gilmore, 11 Okla. 462, 68 Pac. 733.

[56] Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Black v. New York L. Ins. Co., 70 Misc. 532, 127 N. Y. S. 409; McArdle v. Thames Iron Works, 96 App. Div. 139, 89 N. Y. S. 485; Doyle v. Shuttleworth, 41 Misc. 42, 83 N. Y. S. 609; McLean v. Wohltjen, 25 Misc. 742, 55 N. Y. S. 632; Kennedy v. Budd, 5 App. Div. (N. Y.) 140, 39 N. Y. S. 81; Donlon v. English, 89 Hun 67, 35 N. Y. S. 82, 2 N. Y. Ann. Cas. 299, 69 N. Y. St. 260; Barron v. Yost, 16 Daly 441, 12 N. Y. S. 455, 35 N. Y. St. 840.

[57] Swords v. Owen, 34 N. Y. Super. Ct. 277, 43 How. Pr. 176; Lane v. Arnold, 13 Abb. N. Cas. (N. Y.) 73, 11 Daly (N. Y.) 293; O'Toole v. Garvin, 1 Hun (N. Y.) 92, 3 Thomp. & C. (N. Y.) 118.

[58] Wolfe v. Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Kent v. Mojonier, 36 La. Ann. 259.

[59] Rutkowsky v. Bozza, 77 N. J. L. 724, 73 Atl. 502.

[60] Sagal v. Fylar (Conn.), 93 Atl. 1027.

[61] Smith v. Finch, 12 B. C. 186.

[62] In re Richards Bros., 206 Fed. 932.

certificate will not require dismissal of an action by the members of a partnership, where in all other particulars the certificate and publication are regular.[63] However, in one Michigan case,[64] it was held that, since there was a penalty imposed for doing business without complying with the statute, a contract in violation of the statute was void, and that this ruling applied to those buying from the firm as well as those selling to it. A Kentucky case followed a similar rule, the reasoning being that the business was unlawful and the contract therefore void.[65]

§ 265. Use of firm name.—In opposition to the doctrine that the name formally adopted as that of the firm must be used in order that the partnership may be bound,[66] the proposition that such symbolical name may be displaced by an effective substitute when the intention of the parties is to bind the firm and the partnership appropriates the consideration, has found favor

[63] St. Louis &c. R. Co. v. Swearingen, 31 Okla. 785, 123 Pac. 1122.

[64] Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C, 697 and note.

[65] Hunter v. Big Four Auto Co., 162 Ky. 778, 173 S. W. 120, L. R. A. 1915 D, 987 and note.

[66] "A partnership does not create the partners agents to bind the other partners, except by acts done in the firm name." Crouch v. Bowman, 3 Humph. (Tenn.) 209. See Patch v. Wheatland, 8 Allen (Mass.) 102. In this case it was held that one partner could execute a bill of sale of firm personalty by signing the name of the firm or the name of each copartner separately. But, "A very different question would arise if one copartner should undertake to sign the separate names of his copartners to any contract, promise or agreement, by which a separate or individual or a new and additional liability might be created or assumed." (Question undecided.) See also Kirk v. Blurton, 9 M. & W. 284; Royal Canadian Bank v. Wilson, 24 U. C. C. P. 362; Wood v. Martin, 115 Ga. 147, 41 S. E. 490; Gordon v. Bankard, 37 Ill. 147; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Heenan v. Nash, 8 Minn. 407 (Gil. 363), 83 Am. Dec. 790; Tilford v. Ramsey, 37 Mo. 563; Haskell v. Champion, 30 Mo. 136; Mershon v. Hobensack, 22 N. J. L. 372 (affd. 23 N. J. L. 580); Drake v. Elwyn, 1 Caines (N. Y.) 184; Palmer v. Stephens, 1 Denio (N. Y.) 471; Kirby v. Hewitt, 26 Barb. (N. Y.) 607; Masterson v. Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505. See Sullivan v. Visconti, 68 N. J. L. 543, 53 Atl. 598 (affd. 69 N. J. L. 452, 55 Atl. 1133); and Camp v. S. W. Bacon Fruit Co., 117 Ga. 149, 43 S. E. 425.

with a number of courts.[67] "Partners may bind themselves by other than such prescribed firm name, if they choose to adopt for convenience, or to prevent confusion, a different mode of executing their obligations or contracts from the one prescribed by their original agreement."[68] And one partner may, if no firm name has been agreed on, bind the firm within the scope of his authority by any name he may select.[69] So far as the conveyance of real estate to or from a firm is concerned, the rule seems to be that a deed to or by a partnership in the firm name, the full name of no one of the partners being given, does not pass a legal title, but may pass an equitable one.[70] But "where the partnership name thus employed [to designate the grantee or mortgagee] contains the name or names of one or more of the partners the instrument will have legal effect as a conveyance or

[67] Smith v. Collins, 115 Mass. 388; Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. S. 753; Gilroy v. Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. S. 138; Salt Lake City Brew. Co. v. Hawke, 24 Utah 199, 66 Pac. 1058; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991. This apparently does not hold good as regards a nontrading partnership. McPherson v. Bristol, 115 Mich. 258, 73 N. W. 236. So, a technical variance between the name of a firm and the name used in signing notes by one of the partners was immaterial, where the partnership was known commercially by one name as well as the other. Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

[68] Moffat v. McKissick, 8 Baxt. (Tenn.) 517.

[69] Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Palmer v. Stephens, 1 Denio (N. Y.) 471.

[70] "It is the general rule that a conveyance to a partnership by its firm name which does not include the name of any of the partners does not vest in it any legal title because the partnership is not recognized in law as a person. Because the deed is void at law, it by no means follows that the same rule applies in equity. The appellees allege in their amended complaint that the individual members of the firm were the purchasers of the land at the execution sale, and that by mistake of the draftsman the name of the firm, instead of the names of the persons who composed the firm, was written in the deed. It is a fundamental principle of equity that it regards and treats that as done which in good conscience ought to be done, * *.* and it would be inequitable to deny appellees the relief prayed for [reformation]." Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168. See also Emmet v. Dekle, 132 Ga. 593, 64 S. E. 682; Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. 761; Harris v. Bryson, 34 Tex. Civ. App. 532, 80 S. W. 105; Stambaugh v. Smith, 23 Ohio St. 584;

mortgage to the partner or partners thus named,"[71] who will hold the title in trust for the entire firm membership.[72] This impotence of the partnership name likewise extends, under the common law, to the bringing of action by or against the firm,[73] but

New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40. A firm may, as agent, execute a deed to realty in its partnership name. McCulloch County Land & Cattle Co. v. Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739n, 12 Am. St. 736; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805. See further, Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756. And compare Grant v. Bannister, 160 Cal. 774, 118 Pac. 253.

[71] Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235. See also Cole v. Mettee, 65 Ark. 503, 47 S. W. 407, 67 Am. St. 945; Woodward v. McAdam, 101 Cal. 438, 35 Pac. 1016; Bernstein v. Hobelman, 70 Md. 29, 16 Atl. 374; Schumpert v. Dillard, Pinson & Co., 55 Miss. 348; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805; Holmes v. Jarrett, 7 Heisk. (Tenn.) 506; Moreau v. Saffarans, 3 Sneed. (Tenn.) 595, 67 Am. Dec. 582; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252. So, it has been held that under a conveyance of property to "B. & Bro.," copartners, B. had the legal title and could convey the complete legal title thereto, leaving his copartners to their remedy for an accounting for proceeds. Wright v. Brooks, 47 Mont. 99, 130 Pac. 968.

[72] Schumpert v. Dillard, Pinson & Co., 55 Miss. 348. See further in this connection, Chicago Lumber Co. v. Ashworth, 26 Kans. 212.

[73] "That a partnership can not sue or be sued in its partnership name in a circuit court of the United States without alleging the citizenship of its individual members is well settled." Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668. "It is elementary that in suits at law, by or against a copartnership, all the partners must be named as plaintiffs or defendants, as the case may be." As to this proposition, "the authorities (where, as in this state the common law obtains) are practically unanimous." Kalamazoo Trust Co. v. Merrill, 159 Mich. 649, 124 N. W. 597. "It is well settled by the authorities that in a suit to collect a debt due a partnership firm all the partners in interest, except dormant partners, are necessary parties plaintiff." Allen v. Fleck, 54 Tex. Civ. App. 507, 118 S. W. 176. See further, Reid v. McLeod, 20 Ala. 576; Phillips v. Holmes, 165 Ala. 250, 51 So. 625; Simmons v. Titche, 102 Ala. 317, 14 So. 786; Moore v. Burns, 60 Ala. 269; Tompkins v. Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. 31; Leola Lumber Co. v. Bozarth, 91 Ark. 10, 120 S. W. 152; Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139; Gilman v. Cosgrove, 22 Cal. 356; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Roberts v. Rowan, 2 Harr. (Del.) 314; Metal Stamping Co. v. Crandall, Fed. Cas. No. 9493c; Richardson v. Smith, 21 Fla. 336; Jones v. Watson,

not, apparently, to transfers of personalty,[74] nor fully to judgments by or against the partnership.[75] Further the use of the

63 Ga. 679; DeLeon v. Heller, 77 Ga. 740; Page v. Brant, 18 Ill. 38; Ives v. Muhlenburg, 135 Ill. App. 517; Davis v. Hubbard, 4 Blackf. (Ind.) 50; Hughes v. Walker, 4 Blackf. (Ind.) 50; Holland v. Butler, 5 Blackf. (Ind.) 255; Livingston v. Harvey, 10 Ind. 218; Pollock v. Dunning, 54 Ind. 115; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Smith v. Canfield, 8 Mich. 493; Blackwell v. Reid, 41 Miss. 102; Lewis v. Cline (Miss.), 5 So. 112; McCartey v. Kittrell, 55 Miss. 253; Revis v. Lamme, 2 Mo. 207; Mitchell v. Railton, 45 Mo. App. 273; Conrades & Co. v. Spink, 38 Mo. App. 309; Wilson v. Yegen Bros., 38 Mont. 504, 100 Pac. 613; Faulkner v. Whitaker, 15 N. J. L. 438; Tomlinson v. Burke, 10 N. J. L. 295; M'Credy v. Vanneman, 3 N. J. L. 870; Burns v. Hall, 3 N. J. L. 539; Crandall v. Denny, 2 N. J. L. 137; Seely v. Schenck, 2 N. J. L. 75; Union Wine Co. v. Green, 62 Misc. (N. Y.) 551, 115 N. Y. S. 921; Crawford v Collins, 45 Barb. (N. Y.) 269, 30 How. Pr. (N. Y.) 398; Bentley v. Smith, 3 Caines (N. Y.) 170; Smith v. Hoover, 39 Ohio St. 249; Haskins v. Alcott, 13 Ohio St. 210; Dunham v. Shindler, 17 Ore. 256, 20 Pac. 326; Kamm v. Harker, 3 Ore. 208; Porter v. Cresson, 10 Serg. & R. (Pa.) 257; Martin v. Kelly, Cheves L. (S. Car.) 215; Marshal v. Hill, 8 Yerg. (Tenn.) 101; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Tunstall v. Wormley, 54 Tex. 476; Burden v. Cross, 33 Tex. 685; Amarillo Commercial Co. v. Chicago &c. R. Co. (Tex. Civ. App.), 140 S. W. 377; Houghton v. Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Behan v. Long (Tex. Civ. App.), 30 S. W. 380; Pate v. Bacon, 6 Munf. (Va.) 219; Scott v. Dunlop, 2 Munf. (Va.) 349; Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855. Contra: Johnson v. Smith, Morris (Iowa) 105. And compare Spaulding v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; Clayburg v. Ford, 3 Ill. App. 543; Cook v. Canny, 96 Mich. 398, 55 N. W. 987; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. 662; Davis v. Kline, 76 Mo. 310; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198. It has been held that a firm may sue in its partnership name where the defendant does not object that the individuals composing the firm are not parties. Daniels v. Roanoke R. &c. Co., 158 N. Car. 418, 74 S. E. 331. See also Brewer v. Abernathy, 159 N. Car. 283, 74 S. E. 1025.

[74] "A partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property." Hendren v. Wing, 60 Ark. 561, 31 S. W. 149, 46 Am. St. 218. See also Brunson v. Morgan, 76 Ala. 593; Chicago Lumber Co. v. Ashworth, 26 Kans. 212; Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364.

[75] "Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity which is waived, unless due objection be made thereto before judgment." Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198. See further, Spaulding

firm name is, ordinarily, prima facie evidence of the existence of a partnership and that the transaction is had in its behalf.[76] It has been held, however, that there is no presumption that the firm name includes more than one.[77]

§ 266. Unfair competition by use of firm name.—The general rules as to unfair competition apply to the use of a partnership name by those not members of the partnership, that is, if it is used to deceive the public in order to pass off the goods or business of one person as and for that of another, there is a right of action for damages for unfair competition. Thus the partners have the absolute right to use their names as a firm designation, if done honestly, even if other persons are conducting a partnership under a similar style, and although there will be some incidental interference with and injury to the business of the older firm.[78] There is no right whereby persons can acquire a monopoly in the use of their names in business.[79] But if a new firm

Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; DeLeon v. Heller, 77 Ga. 740; Clayburg v. Ford, 3 Ill. App. 543; Ives v. Muhlenburg, 135 Ill. App. 517; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Davis v. Kline, 76 Mo. 310; Conrades v. Spink, 38 Mo. App. 309. And compare Crandall v. Denny, 2 N. J. L. 137; Scott v. Dunlop, 2 Munf. (Va.) 349.

[76] Fuller v. Scott, 8 Kans. 25; Mitchell v. Whaley, 29 Ky. L. 125, 92 S. W. 556; Evans v. Watts, 192 Pa. St. 112, 44 Wkly. Notes Cas. 185, 43 Atl. 464; Richardson v. Erckens, 53 App. Div. (N. Y.) 127, 65 N. Y. S. 872 (affd. 169 N. Y. 588, 62 N. E. 1100). And see Armstrong v. Robinson, 5 Gill & J. (Md.) 412; People v. Croton Aqueduct Board, 5 Abb. Pr. (N. Y.) 316, 6 Abb. Pr. (N. Y.) 42, 26 Barb. (N. Y.) 240; Welsh v. Morris, 81 Tex. 159, 16 S. W. 744, 26 Am. St. 801. "No such presumption operates in a partnership of the non-trading class." Schele v. Wagner, 163 Ind. 20, 71 N. E. 127. Nor apparently does such presumption exist in the case of a promissory note indorsed in the partnership name by one of the members of a firm of attorneys. Worster v. Forbush, 171 Mass. 423, 50 N. E. 936.

[77] Robinson v. Magarity, 28 Ill. 423. But see Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620.

[78] Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. 1002; In re Richards, 206 Fed. 932; Rogers v. Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. 769; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489.

[79] Stuart v. F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Pillsbury v. Pillsbury-Washburn Flour-Mills Co.,

uses a name, even that of its own members, dishonestly, so as to pass off its goods as those of an older firm and thus acquire benefit from the older firm's reputation, there is ground for injunction against such use and damages to the older firm for injuries suffered from such unfair competition.[79a] Thus a firm composed of persons named Waterfill and Frazier can not brand whisky made by them as "Waterfill and Frazier" where another firm had used such designation for twenty years before the latter commenced business, and had a wide reputation in that name, especially since the latter firm began business under the name of "J. M. Waterfill & Co.," and then changed it.[80] Where an inventor of patented grates, formerly connected with a corporation organized to manufacture and sell his grates, formed a partnership for the manufacture of a different grate patented by him, the partnership might advertise the grates as manufactured under letters patent issued to the inventor if it was stated that the partnership was distinct from the corporation, but there was no right to the use of the words "Hot Blast Grates" which had been used as a trade name by the corporation, nor to use words similar in the name of the partnership or its advertising in such manner as to mislead the public.[81] Where a partner in whose name a business was conducted sold his interest to his partner and began the conduct of an entirely different business in a different part of the city under the old firm name, the purchasing partner was held to have a right to damages for the use of the name but not to injunction against the selling partner entering business again under that name.[82] Retiring partners who have organized a corporation have no right to use the old firm name in such a manner as

64 Fed. 841, 12 C. C. A. 432; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; Holloway v. Holloway, 13 Beav. 209, 51 Eng. Reprint 81.

[79a] Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357; Wyckoff v. Howe Scale Co., 110 Fed. 520; American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 72 Am. St. 263; Lee v. Haly, L. R. 5 Ch. 155, 22 L. T. Rep. (N. S.) 251.

[80] Frazier v. Dowling (Ky.), 39 S. W. 45, 18 Ky. L. 1109.

[81] Gordon Hollow Blast Grate Co. v. Gordon, 142 Mich. 488, 105 N. W. 1118.

[82] F. T. Blanchard Co. v. Simon, 104 Va. 209, 51 S. E. 222.

to indicate that the corporation is a continuation of the partnership.[83] A partner in the firm of "Brand & Smith," which transferred its assets and good will to a corporation, who began a new business as "William Smith & Bro.," is not entitled to enjoin the corporation from using the name "Brand & Smith" on the ground of misleading the public.[84] The successor to a wholesale firm doing a shoe business under a trade name is not entitled to use such name in the retail shoe business as successor to such firm, since the latter is a different and distinct business.[85] The firm name as a part of the good will,[86] the right of one partner to sign the firm name[87] and the right to the firm name on dissolution will be treated subsequently.[88]

§ 267. Scope of partnership in general.—The scope of a partnership is necessarily largely determined by the partnership contract, but not altogether. The extent of the joint undertaking and not the partnership agreement, has been held to be the true determinator of the scope of a partnership.[89] Ordinarily, the scope of the partnership will be ascertained by the court from a consideration of the agreement, the undertaking, the circumstances and the intention of the parties.[90] In order to show the scope of a partnership, there may be shown evidence of the common and usual dealings of persons engaged in the same business in the same locality.[91] Previous dealings and acts of the partners may be considered in determining the scope of a partnership business.[92] Ordinarily, a partnership to buy and sell merchandise may not receive and undertake to collect notes.[93] Nor can a

[83] Fite v. Dorman (Tenn.), 57 S. W. 129.

[84] Smith v. Brand, 67 N. J. Eq. 529, 58 Atl. 1029.

[85] Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 171, 63 Pac. 480, 53 L. R. A. 384, 82 Am. St. 346.

[86] See § 329.

[87] See § 427.

[88] See § 593 et seq.

[89] Kyle v. Griffin (W. Va.), 85 S. E. 559; Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948.

[90] Westcott v. Gilman (Cal.), 150 Pac. 777; Kyle v. Griffin (W. Va.), 85 S. E. 559.

[91] Smith v. Collins, 115 Mass. 388.

[92] Cayton v. Hardy, 27 Mo. 536.

[93] Hogan v. Reynolds, 8 Ala. 59.

farming partnership carry on a store for the sale of merchandise.[94] To change the gauge of a narrow-gauge railroad and to operate it, is not within the scope of a partnership agreement to reorganize the company owning the road and to issue new bonds to bondholders.[95] In an action for money loaned to a partnership, the defense can not be set up that it was not being conducted according to the articles of copartnership.[96] A milling business may include the buying of wheat to be ground at the mill.[97] A partnership in real estate and note brokerage, presumptively has not the power to deal in real estate on its own account, but merely to negotiate sales and purchases for others.[98] And it has been held that it is not within the scope of a partnership of lawyers for one partner to perform gratuitous services.[99]

§ 268. General powers of partnership as a whole.—Most powers of a partnership are exercised through one partner as agent. There are many things which a partnership, from its nature, can not do, being held in most states not a legal entity, neither an individual nor a fictitious legal person. There are other things which require the consent of all the partners to do them. Generally, the powers of a partnership are largely determined by the scope of its business. A trading or commercial partnership has many powers which are not appurtenant to a nontrading partnership.[1] A partnership may, within the limits of its scope, act as agent.[2] It may become a partner in another firm.[3] A partnership may, with the consent of all the partners, become guar-

[94] Humes v. O'Bryan, 74 Ala. 64.

[95] Browning v. Kelly, 124 Ala. 645, 27 So. 391 (modifying on rehearing 113 Ala. 420, 21 So. 928).

[96] Moore v. May, 177 Wis. 192, 94 N. W. 45.

[97] Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599.

[98] Davis v. Darling, 80 Hun 299, 30 N. Y. S. 321, 62 N. Y. St. 48.

[99] Davis v. Dodson, 95 Ga. 718, 22 S. E. 645, 29 L. R. A. 496, 51 Am. St. 108.

[1] See § 151 ante.

[2] Jackson v. Porter, 8 Mart. (N. S.) (La.) 200; Eggleston v. Boardman, 37 Mich. 14; Deakin v. Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. 827; McCulloch County Land &c. Co. v. Whitfort, 21 Tex. Civ. App. 314, 50 S. W. 1042.

[3] See § 192 ante.

antor or surety for the payment of the debt of another.[4] It is held a partnership can not be a guardian.[5] It may not act as administrator or executor.[6] A partnership may rent its realty.[7] It may give its note for the debt of a former partnership in which all the members of the firm were partners,[8] or mortgage its property to pay the debts of another.[9] Different firms may make a valid agreement among themselves and all their members that the individual account of one partner with the other firm, shall be treated as a firm account against his firm, the contract being made in good faith, not against law or public policy, and none of the parties under a disability.[10] A trading partnership such as one for buying and selling cattle, may borrow money for business purposes.[11] A partnership may in the firm name execute a valid undertaking to indemnify a sheriff on the levy of an execution in an action by the partners in a partnership matter,[12] or may execute as surety an undertaking in attachment.[13] A partnership can not make an affidavit, and an affidavit signed in the firm name by one partner is void.[14] At common law it was once held a partnership could not make a deed.[15] It has been seen that in many jurisdictions a partnership may sue in the firm name,[16] that in others it can not.[17]

§ 269. **Partnerships as parties to deeds.**—A conveyance of real estate by or to a partnership should not generally be made in the firm name. All the partners should join in a conveyance of partnership real property, but it has been held that a less number than all may execute the conveyance upon authority from the

[4] Allen v. Morgan, 5 Humph. (Tenn.) 624.

[5] De Mazar v. Pybus, 4 Ves. Jur. 644, 31 Eng. Reprint 332.

[6] See § 174 ante.

[7] Williams v. Shelden, 61 Mich. 311, 28 N. W. 115.

[8] Greiss v. Wilkop, 12 Ohio Cir. Ct. 481, 5 Ohio Cir. Div. 544.

[9] Allen v. Morgan, 24 Tenn. (5 Humph.) 624.

[10] Davis v. Dodge, 30 Mich. 267.

[11] Smith v. Collins, 115 Mass. 388.

[12] Schoregge v. Gordon, 29 Minn. 367, 13 N. W. 194.

[13] Tessier v. Crowley, 17 Nebr. 207, 22 N. W. 422; Grollman v. Lipsitz, 43 S. Car. 329, 21 S. E. 272.

[14] Gaddis v. Durashy, 13 N. J. L. 324.

[15] Drake v. Brander, 8 Tex. 351.

[16] See § 265 ante.

[17] See § 265 ante.

other partners.[18] A partnership can not, as such, in most states at least be the grantee of the legal title to lands, and a conveyance to a partnership should contain their individual names in full, with a recital that they are partners doing business under their firm name.[19] But where the firm name is made up of the surnames of the several partners, the effect has been held to vest the title in all whose surnames appear.[20] A deed to persons named, described as constituting a partnership, conveys a legal title to such persons as tenants in common, subject to partnership equities.[21] But a deed to a partnership may be given effect as a contract to convey.[22] It is proper for all the members of a partnership, though their names do not appear in the firm name and style, to join in a conveyance of land acquired under a conveyance to the partnership; and it is not necessary, though desirable, that the deed should recite that these persons constituted the partnership.[23] And a deed to a partnership in the firm name passes at least an equitable title.[24] A few cases hold that a deed to a partnership in its firm name conveys nothing, as it does not contain the name of a grantee.[25] In some jurisdictions it has been held that a deed by a partnership in the firm name conveys title[26] and it has been held that a deed

[18] McGahan v. Bank, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347.

[19] Silverman v. Kristufek, 162 Ill. 222, 44 N. E. 430.

[20] Cole v. Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. 945. And it is held that naming a partnership as grantee does not render the conveyance void, and parol evidence is admissible to identify the partners who are the true grantees. Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157 and note, 111 Am. St. 805. See also Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235; Morse v. Carpenter, 19 Vt. 613.

[21] Blanchard v. Floyd, 93 Ala. 53, 9 So. 418; McCauley v. Fulton, 44 Cal. 355; Printup v. Turner, 65 Ga. 71; Newton v. McKay, 29 Mich. 1; Orr v. How, 55 Mo. 328; Murray v. Blackledge, 71 N. Car. 492; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Baldwin v. Richardson, 33 Tex. 16; Morse v. Carpenter, 19 Vt. 613; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252.

[22] Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600; Kyle v. Roberts Exr., 6 Leigh (Va.) 495.

[23] Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

[24] Daniels v. Roanoke R. &c. Co., 158 N. Car. 418, 74 S. E. 331. See cases cited in note 89, § 284 infra.

[25] Silverman v. Kristufek, 162 Ill. 222, 44 N. E. 430; Riffel v. Ozark Land &c. Co., 81 Mo. App. 177.

[26] Long v. Slade, 121 Ala. 267, 26 So. 31; Ferguson v. Hanauer, 56 Ark.

by a partnership in the firm name conveys nothing.[27] The Uniform Partnership Act makes a very marked change in the rules governing the holding and conveyance of real estate by partners. It provides that any estate in real property may be acquired in the partnership name and that title so acquired can be conveyed only in the partnership name, that a conveyance to a partnership in the partnership name, even without words of inheritance, conveys the entire estate of the grantor unless a contrary intention appears.[28] Other rules as to the conveyance of partnership real estate under such act are treated in a subsequent chapter.[29]

§ 270. Assumption by firm of partner's individual debts.—By mutual consent of all the members of a solvent partnership, the firm may assume on sufficient consideration the individual debts of a partner whether contracted during the existence of the partnership or prior thereto and may sell or mortgage the firm property for such purpose, if the debts are bona fide, and the transaction is in good faith even though the firm assets are decreased and thereby a detriment to creditors is worked.[30] But to

179, 19 S. W. 749; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Baldwin v. Richardson, 33 Tex. 16.

[27] Jordan v. Phillips, 126 Ala. 561, 29 So. 831.

[28] Uniform Partnership Act, § 8 (3) (4).

[29] See § 305, ch. 11.

[30] See generally case note, 29 L. R. A. 681. Case v. Beauregard, 99 U. S. 124, 25 L. ed. 371; Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124; Kennedy &c. Lumber Co. v. Taylor, 96 Cal. xvii, 31 Pac. 1122; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Ladd v. Griswold, 9 Ill. 25, 46 Am. Dec. 443; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Goudy v. Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; In re Stewart, 62 Iowa 614, 17 N. W. 897; Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603; Jones v. Lusk, 2 Met. (Ky.) 356; Wild v. Erath, 27 La. Ann. 171; Hamilton v. Hodges, 30 La. Ann. 1290; Coakley v. Weil, 47 Md. 277; Osborn v. Osborn, 36 Mich. 48; Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; Sexton v. Andersen, 95 Mo. 373, 8 S. W. 564; Bartlett v. Smith, 1 Nebr. (Unoff.) 328, 95 N. W. 661; Larbig v. Peck, 174 N. Y. 513, 66 N. E. 1111; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep.

establish the validity of such an assumption the consent of all the partners[31] and a valid consideration therefor[32] must be shown. It is, of course, sufficient consideration if the debt was originally for the benefit of the firm.[33] Some cases hold that in order to enforce the obligation of the firm, the creditor must show a novation, and extinguishment of the old debt.[34] Some cases do not hold novation necessary.[35] The general rule that if a firm is insolvent, firm property can not be applied to the debts of individual partners, for such is a fraud upon the firm creditors.[36] However, there are some decisions which hold that if the firm is merely insolvent, but there is no actual fraud, and a good consid-

683; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Miller v. Estill, 5 Ohio St. 508, 67 Am. Dec. 305; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; Pepper v. Peck, 17 R. I. 55; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803; Tompkins v. Woodyard, 5 W. Va. 216; Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422; Ex parte Peele, 6 Ves. Jr. 602.

[31] Mauldin v. Branch Bank, 2 Ala. 502; Dowd v. Elstner, 23 La. Ann. 656; Kroll v. Union Trust Co., 133 Mich. 638, 95 N. W. 735; Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. 742; Tompkins v. Woodyard, 5 W. Va. 216.

[32] Merchants Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 377; Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242; Goodenow v. Jones, 75 Ill. 48; Keith v. Fink, 47 Ill. 272; George v. Wamsley, 64 Iowa 175, 20 N. W. 1; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; Huston v. Heyer, 3 Pa. Dist. 533.

[33] Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Kennedy &c. Lumber Co. v. Taylor, 95 Cal. xvii, 31 Pac. 1122; Wild v. Erath, 27 La. Ann. 171; Gwin v. Selby, 5 Ohio St. 96; Coffin's Appeal, 106 Pa. 280; Walker v. Marine Nat. Bank, 98 Pa. St. 574; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[34] Merchants Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374; Wild v. Dean, 3 Allen (Mass.) 579; Osborn v. Osborn, 36 Mich. 48; Bartlett v. Smith, 1 Nebr. (Unoff.) 328, 95 N. W. 661; Rice v. Wolff, 65 Wis. 1, 26 N. W. 181; Ex parte Sandham, 4 Deac. & C. 812.

[35] Case v. Ellis, 4 Ind. App. 224, 30 N. E. 907; Arnold v. Nichols, 64 N. Y. 117; Zell's Appeal, 111 Pa. St. 532, 6 Atl. 107; Jones v. Bartlett, 50 Wis. 589, 7 N. W. 655.

[36] Roop v. Herron, 15 Nebr. 73, 17 N. W. 353; Walsh v. Kelly, 42 Barb. (N. Y.) 98, 27 How. Pr. 359; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Fuller Electrical Co. v. Lewis, 101 N. Y. 674, 5 N. E. 437.

eration, the firm may make a valid agreement assuming the debts of one partner.[37] It has been said that the question of fraud should be determined from the circumstances of each particular case.[38]

[37] Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603; In re Edwards & Wigginton, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Sigler v. Knox County Bank, 8 Ohio St. 511; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; Pepper v. Peck, 17 R. I. 55; Marks v. Hill, 15 Grat. (Va.) 400.

[38] Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306.

CHAPTER XI

PARTNERSHIP CAPITAL AND PROPERTY

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§ 275. Definition of "capital" and "property."—The capital of a partnership is the sum fixed by the agreement of the

partners to be contributed by them for the purpose of commencing and carrying on the partnership business,[1] and while title to the capital passes to the firm and is always part and parcel of the firm "property,"[2] the latter is not limited to such capital alone but includes everything having a money value, which belongs to the firm. Partnership "capital" is, therefore, a constant quantity; partnership "property," a variable.[3] In keeping with this doctrine, the consent of all of the partners is a condition precedent to either the increase or diminution of such capital.[4] In general the agreement of the partners alone determines of what their capital shall consist, and what shall be the character[5] and amount

[1] Lindley Partnership, *320; Topping v. Paddock, 92 Ill. 92; Taft v. Schwamb, 80 Ill. 289. See further, Ball v. Farley, 81 Ala. 288, 1 So. 253; Stafford v. Fargo, 35 Ill. 481; Evans v. Hanson, 42 Ill. 234; Taylor v. Coffing, 18 Ill. 422; Sexton v. Lamb, 27 Kans. 426; Raymond v. Putnam, 44 N. H. 160; Matter of Talmage, 161 N. Y. 643, 57 N. E. 1126; Procter v. Procter, 1 Ohio S. & C. P. Dec. 651, 1 Ohio N. P. 44; Brann's Appeal, 105 Pa. St. 414; Mather's Exr. v. Patterson, 33 Pa. St. 485; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Dean v. Dean, 54 Wis. 23, 11 N. W. 239.

[2] "The expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such." Lindley Partnership, *320; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n.

[3] Lindley Partnership, *320; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Malley v. Atlantic Fire &c. Ins. Co., 51 Conn. 222; Taft v. Schwamb, 80 Ill. 289; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Nutting v. Ashcroft, 101 Mass. 300; Clements v. Jessup, 36 N. J. Eq. 569; Smith v. Small, 54 Barb. (N. Y.) 223; Hiscock v. Phelps, 49 N. Y. 97; Clark's Appeal, 72 Pa. St. 142.

[4] Heslin v. Fay, 15 L. R. Ir. 431; Dicta of Lord Bramwell in Bouch v. Sproule, 12 App. Cas. 385; Crawshay v. Collins, 15 Ves. Jr. 218; Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045; Stevens v. Yeatman, 19 Md. 480; In re Fulmer's Appeal, 90 Pa. St. 143; Cock v. Evans' Heirs, 9 Yerg. (Tenn.) 287.

[5] Ward v. Thompson, 22 How. (U. S.) 330, 16 L. ed. 249; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Flagg v. Stowe, 85 Ill. 164; Wild v. Erath, 27 La. Ann. 171; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; Citizens' Fire &c. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Clements v. Jessup, 36 N. J. Eq. 569; Dunnell v. Henderson, 23 N. J. Eq. 174; Ruckman v. Decker, 23 N. J. Eq. 283; Uhler v. Semple, 20 N. J. Eq. 288; Goldman v. Rosenberg, 116 N. Y. 78, 22 N. E. 259; Jones v. Butler, 87 N.

of each partner's contribution thereto.[6] The sounder doctrine seems to be that when partners agree that one or more of their number shall contribute time, skill, or labor to the business of the firm, the contribution of such partner or partners may properly be regarded as a part of the "capital" of the partnership.[7] The contrary view[8] is based upon the ground that such contribution gives to the contributing partner or partners "no rights in the final distribution of the firm capital." This conclusion, however, can not be accepted as valid until it can be said with equal force, in the most general terms, that no contribution whose earning potentiality will be temporarily exhausted in the interest of the partnership can be designated "capital," which latter position will, in effect, abolish altogether the use of the word "capital" as now understood.[9] A rebuttable presumption exists that each partner contributed an equal amount to the firm capital.[10] In ascertaining the amount actually contributed by any one partner, allowance must be made for any lien or encumbrance upon his

Y. 613; Van Voorhis v. Webster, 85 Hun 591, 66 N. Y. St. 793, 33 N. Y. S. 121; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; Calder v. Crowley, 74 Wis. 157, 42 N. W. 266. See also Rapier v. Gulf City Paper Co., 64 Ala. 330; Harper v. Lamping, 36 Cal. 641; Logan v. Bond, 13 Ga. 192; Griffen v. Cooper, 50 Ill. App. 257; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Owens v. Davis, 15 La. Ann. 22; Walker v. Schindel, 58 Md. 360.

[6] Moley v. Brine, 120 Mass. 324; Dunnell v. Henderson, 23 N. J. Eq. 174; Jones v. Butler, 23 Hun (N. Y.) 367 (affd. 87 N. Y. 613); Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686. See also Taylor v. Coffing, 18 Ill. 422; Robertson v. DeLizardi, 4 Rob. (La.) 300; Juilliard v. Orem, 70 Md. 465, 17 Atl. 333; Pierce v. Ten Eyck, 9 Mont. 349, 23 Pac. 423; Uhler v. Semple, 20 N. J. Eq. 288; Guccione v. Scott, 33 App. Div. (N. Y.) 214, 53 N. Y. S. 462; Lovett v. Perry, 98 Va. 604, 37 S. E. 33.

[7] Story on Partnership (7th ed.), § 15; Peacock v. Peacock, 16 Ves. Jr. 49, 10 R. R. 138; Reid v. Hollinshead, 4 B. & C. 867, 7 D. & R. 444, 28 R. R. 488; Meyer v. Sharpe, 5 Taunt. 74, 2 Rose 124; Waugh v. Carver, 2 H. Bl. 235; Dale v. Hamilton, 5 Hare 369, 16 L. J. Ch. 126, 11 Jur. 163; Perry v. Butt, 14 Ga. 699; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293.

[8] As stated in 22 Am. & Eng. Encyc. of Law 86 (citing Lovett v. Perry, 98 Va. 604, 37 S. E. 33; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407).

[9] Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260.

[10] Peacock v. Peacock, 16 Ves. Jr. 49, 10 R. R. 138; Copland v. Toulmin, 7 Cl. & F. 350, West, 164; Robinson v. Anderson, 20 Beav. 98, 7 De G., M.

contribution.[11] "A contribution to the capital of a firm by a partner does not constitute a loan to the other partner."[12] Undivided profits allowed to remain in the firm, do not become capital.[13] Upon dissolution each partner is entitled to draw out capital according to the proportion in which he contributed, and if there are losses, the capital is regarded as a debt of the firm due the partners, and if there is a deficiency of firm assets, the members will be required to contribute in order to make up the amount.[14]

§ 276. Partnership property obtained with partnership funds.—Further than determining the character and amount of capital the question of what belongs to the firm or, in other words, of what is firm property, does not ordinarily turn upon any predetermination of the partners, for whatever, following the acquisition of the capital, is in any manner added to or obtained by means of, the common stock, belongs to the partnership and is partnership property to the same extent as its capital itself.[15] This holds good both as to realty and personalty. "While only a qualified citizen can by location, or filing, initiate a right to a tract of the public land from which there can, by compliance with the requirements of law, be perfected a complete and valid title in fee, the rights thus initiated by the qualified citizen become and are recognized as property susceptible of sale and transfer, and that such sale and transfer may be made to persons not possessing the qualifications that

& G. 239; Jackson v. Crapp, 32 Ind. 422. But see Taylor v. Coffing, 18 Ill. 422; Livingston v. Blanchard, 130 Mass. 341; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Raymond v. Putnam, 44 N. H. 160; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Conroy v. Campbell, 45 N. Y. Super. Ct. 326; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407.

[11] Nichol v. Stewart, 36 Ark. 612; Sexton v. Lamb, 27 Kans. 426; Dunnell v. Henderson, 23 N. J. Eq. 174.

[12] Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423.

[13] Dean v. Dean, 54 Wis. 23, 11 N. W. 239.

[14] Bradbury v. Smith, 21 Maine 117; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Barfield v. Loughborough, 42 L. J. Ch. 179, L. R. 8 Ch. 1, 27 L. T. 499; In re Anglesea Colliery Co., L. R. 2 Eq. 379.

[15] "The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and of all that is

would enable them to initiate such property rights and interests [in this case, a partnership]; * * * [and] the incapacity of such persons to initiate such right, or subsequently to perfect such title, can be called in question only by the sovereign, and can not be invoked to attack their right to be protected in the possession and enjoyment of their property, or to attack the validity of their conveyance of the same to subsequent grantees."[16] The

subsequently acquired thereby." McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907. See further Wade v. Martin, 157 Ala. 215, 47 S. 340; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Scutt v. Robertson (Ill.), 17 N. E. 14; Laswell v. Robbins, 39 Ill. 210; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Fairfield v. Phillips, 83 Iowa 571, 49 N. W. 1025; Phillips v. Purington, 15 Maine 425; Scott v. McKinney, 98 Mass. 344; Person v. Wilson, 25 Minn. 189; Priest v. Chouteau, 12 Mo. App. 252 (affd. 85 Mo. 398, 55 Am. Rep. 373); Swift v. Dean, 6 Johns. (N. Y.) 523; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Thursby v. Lidgerwood, 69 N. Y. 198; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Robinson v. Gilfillan, 15 Hun (N. Y.) 267; Le Roy v. Mathewson, 47 N. Y. Super. Ct. 389; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Brock v. Brock, 116 Pa. St. 109, 9 Atl. 486; Jones v. Smith, 31 S. Car. 527, 10 S. E. 340; Wright v. Market Bank (Tenn.), 60 S. W. 623; Rogers v. Nichols, 20 Tex. 719; Glasscock v. Glasscock's Admr., 17 Tex. 480; Deming v. Mass, 40 Utah 501, 121 Pac. 971; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Strong v. Hoskin, 85 Wis. 497, 55 N. W. 852. And compare Hatchett v. Blanton, 72 Ala. 423. But see Crawshay v. Maule, 1 Swanst. 495, 1 Wils. 181, 18 R. R. 126; Fereday v. Wightwick, Tamlyn 250, 1 Russ. & M. 45, 31 R. R. 93; Waterer v. Waterer, L. R. 15 Eq. 402, 21 W. R. 508; Jackson v. Jackson, 9 Ves. Jr. 591; Davies v. Games, 12 Ch. D. 813, 28 W. R. 16; Brown v. Oakshot, 24 Beav. 254; Davis v. Davis (1894), 1 Ch. 393, 63 L. J. Ch. 219, 8 R. 133, 70 L. T. 265, 42 W. R. 312; Steward v. Blakeway, L. R. 4 Ch. 603; Patterson v. Ware, 10 Ala. 444; Caldwell v. Leiber, 7 Paige (N. Y.) 483.

[16] Neal v. Kayser, 12 Ariz. 118, 100 Pac. 439. See further Causler v. Wharton, 62 Ala. 358; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. 418; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Rovelsky v. Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. 83; Brewer v. Browne, 68 Ala. 210; Caldwell v. Parmer's Admr., 56 Ala. 405; Little v. Snedecor, 52 Ala. 167; Murphy v. Abrams, 50 Ala. 293; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264; Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Kayser v. Maugham, 8 Colo. 339, 7 Pac. 286; Sigourney v. Munn, 7 Conn. 11; Robertson v. Baker, 11 Fla. 192; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Alkire v. Kahla, 123 Ill. 496, 17 N. E. 693, 5 Am. St. 540; Indiana Pottery

controlling consideration in deciding of what the firm as such has thus become possessed is usually, in a sense at least, one of the

Co. v. Bates, 14 Ind. 8; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Drake v. Moore, 66 Iowa 58, 23 N. W. 263; Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190; Sherley v. Thomasson's Exr., 8 Ky. L. (abstract) 351, 1 S. W. 530; Bryant v. Hunter, 6 Bush (Ky.) 75; May v. New Orleans &c. R. Co., 44 La. Ann. 444, 10 So. 769; Lane v. Tyler, 49 Maine 252; Blake v. Nutter, 19 Maine 16; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Killefer v. McLain, 70 Mich. 508, 38 N. W. 455; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Thayer v. Lane, Walk. Ch. (Mich.) 200; Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Alexander v. Kimbro, 49 Miss. 529; Carlisle's Admrs. v. Mulhern, 19 Mo. 56; Rockefeller v. Dellinger, 22 Mont. 418, 74 Am. St. 613; Smith v. Jones, 18 Nebr. 481, 25 N. W. 624; Hogle v. Lowe, 12 Nev. 286; Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Deveney v. Mahoney, 23 N. J. Eq. 247; Smith v. Small, 54 Barb. (N. Y.) 223; Kendall v. Rider, 35 Barb. (N. Y.) 100; Morton v. Ostrom, 33 Barb. (N. Y.) 256; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Averill v. Loucks, 6 Barb. (N. Y.) 19; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Smith v. Danvers, 7 N. Y. Super. Ct. 669; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. S. 78, 63 N. Y. St. 320 (affd. 11 App. Div. 632, 41 N. Y. S. 1111, 75 N. Y. St. 1479); Donaldson v. Cape Fear Bank, 1 Dev. Eq. (N. Car.) 103, 18 Am. Dec. 577; McCaskill v. Lancashire, 83 N. Car. 393; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; Sumner v. Hampson, 8 Ohio St. 329, 32 Am. Dec. 722; Church v. Adams, 37 Ore. 355, 61 Pac. 639; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987; William's Appeal, 122 Pa. St. 472, 15 Atl. 912; In re Grubb's Appeal, 66 Pa. St. 117; Meason v. Kaine, 63 Pa. St. 335; In re Abbott's Appeal, 50 Pa. St. 234; Lacy v. Hall, 37 Pa. St. 360; Black v. Seipt, 12 Phila. (Pa.) 360, 34 Leg. Int. (Pa.) 66; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Baldwin v. Richardson, 33 Tex. 16; Willis v. Freeman, 35 Vt. 44, 82 Am. Dec. 619; Dewey v. Dewey, 35 Vt. 555; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336; Bird v. Morrison, 12 Wis. 138. And compare Hatchett v. Blanton, 72 Ala. 423; Filkins v. Blackman, 13 Blatchf. (U. S.) 440, Fed. Cas. No. 4786; Richards v. Maynard, 61 Ill. App. 336 (affd. 166 Ill. 466, 46 N. E. 1138, 57 Am. Rep. 145); Wiltse v. Fifield, 143 Iowa 332, 121 N. W. 1086; Gillisse v. Gibson, 6 La. Ann. 125; Phillips v. Purington, 15 Maine 425; McGrath v. Sinclair, 55 Miss. 89; Cox

intent,[17] express[18] or implied, which prompted the partner or partners to act.[19] "The true method of determining, as between

v. McBurney, 2 Sandf. (N. Y.) 561, 4 N. Y. Super. Ct. 561; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Hazard v. Caswell, 93 N. Y. 259, 45 Am. Rep. 198; Baumert v. Daeschler, 65 Misc. (N. Y.) 526, 120 N. Y. S. 957; Kellogg v. Totten, 16 Abb. Pr. (N. Y.) 35; Bininger v. Clark, 60 Barb. (N. Y.) 113, 10 Abb. Pr. (N. S.) (N. Y.) 264; Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; Dusenberry v. Horning, 56 Ore. 210, 106 Pac. 1019; McCoy v. Crosfield, 54 Ore. 591, 104 Pac. 423; Blood v. Ludlow Carbon Black Co., 150 Pa. St. 1, 24 Atl. 348, 30 Wkly. Notes Cas. (Pa.) 253; Coder v. Huling, 27 Pa. St. 84; Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97, Ann. Cas. 1913 E, 1015; Newell v. Humphrey, 37 Vt. 265; Jennings v. Jennings, L. R. (1898) 1 Ch. 378, 67 L. J. Ch. 190; Page v. Ratliffe, 76 L. T. (N. S.) 63. But see Arundell v. Bell, 52 L. J. Ch. 537, 49 L. T. (N. S.) 345, 19 Eng. Rul. Cas. 657; Hines v. Driver, 72 Ind. 125; Auten v. Ellingwood, 51 How. Pr. (N. Y.) 359.

[17] New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167; McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530, 14 U. S. App. 433; Bopp v. Fox, 63 Ill. 540; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Hill v. Cornwall, 95 Ky. 512, 26 S. W. 540, 16 Ky. L. 97; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Rockefeller v. Dellinger, 22 Mont. 418, 74 Am. St. 613; Brown v. O'Brien, 4 Nebr. 195; Dawson v. Parsons, 10 Misc. 428, 63 N. Y. St. 320, 31 N. Y. S. 78 (affd. 11 App. Div. 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111); Barry v. Kennedy, 11 Abb. Pr. (N. S.) (N. Y.) 421; Meridian Nat. Bank v. McConica, 4 Ohio Cir. Dec. 106, 8 Ohio C. C. 442; Wilson v. Black, 164 Pa. St. 555, 30 Atl. 488; Maybin v. Moorman, 21 S. Car. 346; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Hunt v. Benson, 2 Humph. (Tenn.) 459; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. See also Pomeroy v. Benton, 57 Mo. 531. and Morris v. Barrett, 3 Y. & J. 384.

[18] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Lucas v. Cooper, 15 Ky. L. 642, 23 S. W. 959; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Schlicher v. Whyte, 74 N. J. Eq. 839, 71 Atl. 337; Fairchild v. Fairchild, 64 N. Y. 471; Le Roy v. Mathewson, 47 N. Y. Super. Ct. 389; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 33 N. Y. S. 121, 66 N. Y. St. 793; Auten v. Ellingwood, 51 How. Pr. (N. Y.) 359; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; In re Lefevre's Appeal, 69 Pa. St. 122, 8 Am. Rep. 229; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

[19] In re Strang, 166 Fed. 779; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Chappell

the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property, is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control."[20] As a general thing when partnership funds have been used in purchasing property, it is presumed that such property was intended to belong to the firm,[21] and this, though the title thereto has been made to a partner or partners individually.[22] Thus, a seat on a stock exchange which was purchased with partnership funds, and was so carried on the firm books, is partnership property, even if it

v. Chappell, 125 App. Div. (N. Y.) 127, 109 N. Y. S. 648; Fairchild v. Fairchild, 64 N. Y. 471; Brayton v. Sherman, 45 App. Div. (N. Y.) 58, 60 N. Y. S. 1118 (affd. 166 N. Y. 610, 59 N. E. 1119); Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Collner v. Grieg, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. 899; In re Shafer's Appeal, 106 Pa. St. 49; Winslow v. Chiffelle, Harp. Eq. (S. Car.) 25; Murrell v. Mandelbaum, 85 Tex. 32, 19 S. W. 880, 34 Am. St. 777; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Wheatley v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Crawshay v. Maule, 1 Swanst. 495, 1 Wils. 181, 18 R. R. 126. See further Ames v. Ames, 37 Fed. 30; Lincoln v. White, 30 Maine 291.

[20] Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889.

[21] Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Loubat v. Nourse, 5 Fla. 350; Alkire v. Kahla, 123 Ill. 496, 17 N. E. 693, 5 Am. St. 540; Pepper v. Pepper, 24 Ill. App. 316; Bradbury v. Smith, 21 Maine 117; Scott v. McKinney, 98 Mass. 344; Catron v. Shepherd, 8 Nebr. 308, 1 N. W. 204; Dawson v. Parsons, 10 Misc. 428, 63 N. Y. St. 320, 31 N. Y. S. 71 (affd. 11 App. Div. 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111); Thursby v. Lidgerwood, 69 N. Y. 198; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Swift v. Dean, 6 Johns. (N. Y.) 523; Hunt v. Benson, 2 Humph. (Tenn.) 459; Deming v. Moss, 40 Utah 501, 121 Pac. 971; Ex parte Hinds, 3 De G. & Sm. 613, 14 Jur. 286.

[22] Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Ferguson v. Hanauer, 56 Ark. 179, 19 S. W. 749; Bopp v. Fox, 63 Ill. 540; Holmes v. Stix, 104 Ky. 351, 47 S. W. 243, 20 Ky. L. 593; Davis v. Davis, 60 Miss. 615; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Partridge v. Wells, 30 N. J. Eq. 176; Leary v. Boggs, 41 Hun (N. Y.) 643, 1 N. Y. St. 571; Williams v. Gillies, 13 Hun (N. Y.) 422; Traphagen v. Burt, 67 N. Y. 30; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Smith v. Smith, 5 Ves. Jr. 189. See further Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; Morris v. Brown, 177 Ala. 389, 58 So. 910; Deming v. Moss, 40 Utah 501, 121 Pac. 971; Scott v. Dixie, 70 W. Va. 533, 74 S. E. 659, 40

stands in the name of one partner.[23] This presumption is, of course, rebuttable,[24] as is likewise the one that the partnership owns the property employed in its business.[25] It has been held, that the legal title to property does not vest in the partnership merely because partnership funds were used in its purchase;[26] but where the partners agreed that an undivided half of the property should be assigned to each partner, the partnership became the equitable assignee of the property.[27] If a partner withdraws money from the business in bad faith, property purchased with such money, without his partner's consent, becomes firm property, but if the partner knows of and consents to the withdrawal, the property purchased is not partnership property.[28] Practically any property bought with firm money for its use is firm property although not strictly within the scope of its business.[29]

§ 277. Property owned by partner used in firm business. —If property owned by one of the partners before the organization of the firm has been used for partnership purposes, it must

L. R. A. (N. S.) 152n; Richtman v. Watson, 150 Wis. 385, 136 N. W. 797.

[23] In re Hearns, 163 App. Div. 897, 147 N. Y. S. 447.

[24] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Price v. Hicks, 14 Fla. 565; Chandler v. Jessup, 132 Ind. 351, 31 N. E. 1109; Goodwin v. Richardson, 11 Mass. 469; Pitts v. Waugh, 4 Mass. 424; Dyer v. Clark, 5 Metc. (Mass.) 562, 30 Am. Dec. 697; In re Lefevre's Appeal, 69 Pa. St. 122, 8 Am. Rep. 229; McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Bosworth v. Hopkins, 85 Wis. 50, 55 N. W. 424.

[25] Flagg v. Stow, 85 Ill. 164; Pearce v. Pearce, 77 Ill. 284; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Van Voorhis v. Webster, 85 Hun 591, 33 N. Y. S. 121, 66 N. Y. St. 793; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; Ex parte Owen, 4 De G. & Sm. 351, 20 L. J. Bk. 14, 15 Jur. 983; Ex parte Smith, 3 Madd. 63, Buck 149; Burdon v. Barkus, 4 De G., F. & J. 42, 31 L. J. Ch. 521, 8 Jur. (N. S.) 656. See further Ashton v. Robinson, L. R. 20 Eq. 25; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 672. And compare Grant v. Bannister, 160 Cal. 774, 118 Pac. 253; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228.

[26] Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97, Ann. Cas. 1913 E, 1015.

[27] Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97, Ann. Cas. 1913 E, 1015.

[28] Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[29] Kilgore v. Shannon, 60 So. 520, 6 Ala. App. 537.

be determined from the partnership agreement and the conduct of the parties, whether it has become a part of the firm property or remains the property of the one partner.[30] Thus a lease of premises occupied by the firm business, procured by one partner before formation of the partnership may become firm property without formal assignment, if it is so understood and the partners regard it as such.[31] But merely paying the rent by the partnership does not make the lease a partnership asset.[32] Improvements made with firm money on lands owned by one partner, or both partners as individuals, are firm property.[33] If only the use of property owned by a partner is put in the firm, it does not become partnership property,[34] but if the property is to be used up in the firm business or sold and its proceeds used, this is evidence of an intention to make it firm property.[35] Where some of the parties put up property to be used in the business, offsetting another's business experience and skill, it is often held that there is a partnership only in profits, and that the property used in the business does not become firm property.[36] The firm does not acquire a right to the information or inventive genius of a partner,[37] unless he has clearly agreed to make them firm property.[38]

[30] Buckingham v. Chicago First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. R. 465; In re Swift, 114 Fed. 947, 118 Fed. 348, 9 Am. Bankr. 237; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Marcus v. McFarland, 119 Md. 269, 86 Atl. 337; Penny v. Black, 22 N. Y. Super. Ct. 310, 9 Bosw. (N. Y.) 310; In re Bailey, 187 Pa. St. 381, 41 Atl. 293.

[31] Quinn v. Reed, 148 N. Y. S. 801. Compare In re Welch, 77 Misc. 427, 137 N. Y. S. 941, which is somewhat opposed in its holding.

[32] Quinn v. Reed, 148 N. Y. S. 801.

[33] Lane v. Tyler, 49 Maine 252.

[34] Stumph v. Bauer, 76 Ind. 157; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 33 N. Y. S. 121, 66 N. Y. St. 793; Penny v. Black, 22 N. Y. Super. Ct. 310, 9 Bosw. (N. Y.) 310; Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

[35] Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Person v. Wilson, 25 Minn. 189.

[36] Murphey v. Warren, 55 Nebr. 215, 75 N. W. 573; Hillock v. Grape, 111 App. Div. 720, 97 N. Y. S. 823; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 33 N. Y. S. 121, 66 N. Y. St. 793.

[37] Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677 (knowledge of the location of a valuable ore claim); Belcher v. Whittemore, 134 Mass. 330; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Aas v. Benham (1891), 2 Ch. 244, 65 L. T. Rep. (N. S.) 25.

[38] Hill v. Miller, 78 Cal. 149, 20 Pac.

§ 278. Property acquired in exercise of partnership rights.—Partnership property includes the good will of the firm[39] and things acquired in the exercise of partnership rights,[40] such as debts due the firm from one partner,[41] bonds or notes held by a partner to secure the firm's debt, or rights,[42] a sum to be forfeited if a purchaser of real estate from a real estate brokerage firm fails to pay the purchase-price,[43] hay on land staked off by a partner while a member of a firm conducting the business of cattle-raising,[44] a legacy to one partner contributed by him to firm capital,[45] land purchased for firm business with firm money,[46] profits from building an electric road and selling its stocks and bonds,[47] profits of a land deal though not concluded within the time originally fixed,[48] damages for breach of a contract, although not recovered until after one partner's death[49] and sometimes a lease of the firm's place of business.[50] A judgment in favor of two persons as partners for a trespass on firm property, is part of the firm assets.[51]

§ 279. Patents and trade-marks.—Patent rights may be held as partnership property.[52] A patent obtained on an inven-

304; Blood v. Ludlow Carbon &c. Co., 150 Pa. St. 1, 24 Atl. 348.

[39] Smith v. Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; Spiess v. Rosswog, 63 How. Pr. (N. Y.) 401, 48 N. Y. Super. Ct. 135 (affd. 96 N. Y. 651). But compare Smith v. Smith, 51 La. Ann. 72, 24 So. 618.

[40] Day v. Perkins, 2 Sandf. Ch. (N. Y.) 359; Lowber v. Le Roy (N. Y.), 2 Sandf. (N. Y.) 202; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Kreis v. Gorton, 23 Ohio St. 468.

[41] George v. Morison, 93 Md. 132, 48 Atl. 744; Russell v. Minnesota Outfit, 1 Minn. 162 (Gil. 136).

[42] Gillisse v. Gibson, 6 La. Ann. 125; Wilson v. Cobb, 29 N. J. Eq. 361; Allison v. Davidson, 17 N. Car. 79.

[43] Kayser v. Mangham, 8 Colo. 232, 6 Pac. 803.

[44] Whipple v. Stuart, 26 Mont. 219, 66 Pac. 941.

[45] Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628.

[46] Williams v. Meyer (Tex. Civ. App.), 64 S. W. 66.

[47] Leeds v. Townsend, 89 Ill. App. 646.

[48] Thomas v. Hollingsworth, 181 Ind. 411, 103 N. E. 840.

[49] Richards v. Maynard, 61 Ill. App. 336, 46 N. E. 1138 (affg. 166 Ill. 466, 57 Am. Rep. 145).

[50] Spiess v. Rosswog, 63 How. Pr. (N. Y.) 401, 48 N. Y. Super. Ct. 135 (affd. 96 N. Y. 651).

[51] Collins v. Butler, 14 Cal. 223.

[52] Freeman v. Lowell Specialty Co.,

tion which is part of the capital stock is partnership property,[53] so is a license to manufacture a patented article.[54] A partnership trade-mark[55] or a trade-mark conveyed to the firm by one partner, under the partnership agreement[56] or trade-name[57] may be partnership property. The licensed use in the business of a trade-mark by its owner does not constitute it firm property.[58] If a trade-mark is owned by one who entered into a partnership, title to the trade-mark will not pass to the partnership except by express agreement, but may be retained in the owner and on his retirement from the partnership and agreement to allow the other partner to use the trade-mark under certain conditions, such partner has no right to use it in violation of the conditions.[59] The owner of a trade-mark used in a partnership business, may on dissolution transfer the right to use the trade-mark to the purchaser of his interest.[60]

§ 280. Partnership property—Uniform Partnership Act. —The Uniform Partnership Act defines partnership property substantially in the terms laid down by the general rule followed by the courts: "All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property. Unless the contrary intention appears, property acquired with partnership funds is partnership property."[61] However, in respect to partnership real estate, it changes the prevailing rule very materially by providing that title to real estate may be acquired and

174 Mich. 59, 140 N. W. 572; Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97, Ann. Cas. 1913 E, 1015.

[53] Hill v. Miller, 78 Cal. 149, 20 Pac. 304.

[54] Scutt v. Robertson, 127 Ill. 135, 19 N. E. 851.

[55] Smith v. Imus, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

[56] Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

[57] Wright Restaurant Co. v. Seattle Restaurant Co., 67 Wash. 690, 122 Pac. 348.

[58] Batcheller v. Thomson, 93 Fed. 660, 35 C. C. A. 532.

[59] Greacen v. Bell, 115 Fed. 553.

[60] Batcheller v. Thomson, 93 Fed. 660, 35 C. C. A. 532.

[61] Uniform Partnership Act, § 8, (1) (2).

conveyed in the partnership name, and that a conveyance to a partnership in the partnership name, passes the entire estate.[62]

§ 281. When real estate is partnership property.—In this chapter there will be considered, what constitutes partnership real estate, its equitable conversion into personalty and some general rights respecting it. In subsequent chapters will be considered as to partnership real estate the rights of partners inter se, of creditors of a surviving partner and of representatives of deceased partners. Land conveyed to members of a copartnership as tenants in common, but purchased with copartnership funds and used for copartnership purposes, is treated in equity as copartnership personal property.[63] The rule applies to real

[62] Uniform Partnership Act, § 8 (3) (4).

[63] Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Ames v. Ames, 37 Fed. 30; Hatchett v. Blanton, 72 Ala. 423; Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Robertson v. Baker, 11 Fla. 192; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Jackson v. Stanford, 19 Ga. 14; Pepper v. Pepper, 24 Ill. App. 316; Morgan v. Olvey, 53 Ind. 6; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Pepper v. Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. 122; Spalding v. Wilson, 80 Ky. 589, 4 Ky. L. 575; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; May v. New Orleans, 44 La. Ann. 444, 10 So. 769; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Burnside v. Merrick, 4 Metc. (Mass.) 537; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Goodwin v. Richardson, 11 Mass. 469; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Matthews v. Hunter, 67 Mo. 293; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Whitmore v. Shiverick, 3 Nev. 288; Cilley v. Huse, 40 N. H. 358; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Matlack v. James, 13 N. J. Eq. 126; Struthers v. Pearce, 51 N. Y. 357; Hiscock v. Phelps, 49 N. Y. 97; Leary v. Boggs, 41 Hun 643, 1 N. Y. St. 571; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Haynes v. Brooks, 8 Civ. Proc. (N. Y.) 106; Ross v. Henderson, 77 N. Car. 170; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Miller v. Proctor, 20 Ohio St. 442; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987; In re Abbott's Appeal, 50 Pa. St. 234; Lime Rock Bank v. Phetteplace, 8 R. I. 56; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227; Boyce v. Coster, 4 Strob. Eq. (S. Car.) 25; Winslow v. Chiffelle, Harp. Eq. (S. Car.) 25; Willis v. Freeman, 35 Vt. 44, 82 Am. Dec. 619; Forde v. Herron, 4 Munf. (Va.) 316; Jones v. Neale, 2 Pat. & H. (Va.) 339; Cunningham v. Ward, 30 W. Va. 572, 5 S. E. 646. But see Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Frey v. Eisenhardt, 116 Mich.

as well as personal property, that if purchased in the name of one partner, but with partnership funds for partnership use, it becomes in equity partnership property, whether or not the other partner consented to the purchase,[64] and is treated in equity as personalty for partnership purposes.[65] The above rule holds especially if the conduct of the parties shows it was intended to be treated as partnership property.[66] "Whether the land belongs to a firm or to one of the individuals composing it,—when the title is in his name, and not in that of his firm, it must be solved by what appears to have been the intention of the parties. Prima facie, ownership is where the muniment of title places it; but if by all the circumstances attending the transaction, which may be shown by parol, if there is no written evidence,—it is made to appear that, in the intention of the parties, it was purchased for and was treated as partnership property, that presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership."[67] If one member of the partnership without his copartner's knowledge purchases real estate with partnership funds, and takes title in the name of an outside party, it is held such property is a partnership asset.[68]

160, 74 N. W. 501; Gordon v. Gordon, 49 Mich. 501, 13 N. W. 834; Dexter v. Dexter, 43 App. Div. 268, 60 N. Y. S. 371.

[64] Richtman v. Watson, 150 Wis. 385, 136 N. W. 797; McKinnon v. McKinnon, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Payne v. Martin, 39 Colo. 265, 89 Pac. 46; Crone v. Crone, 180 Ill. 599, 54 N. E. 605; Jones v. Davies, 60 Kans. 309, 56 Pac. 484, 72 Am. St. 354; Calder v. Creditors, 47 La. Ann. 346, 16 So. 852; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; York v. Tozer, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. 395; Barney v. Pike, 94 App. Div. 199, 87 N. Y. S. 1038; Hardin v. Hardin, 25 S. Dak. 601, 129 N. W. 108; Johnson v. Rankin (Tenn.), 59 S. W. 638; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195n. See cases cited in note 22, § 276 ante.

[65] Troll v. St. Louis, 257 Mo. 626, 168 S. W. 167; Scott v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152n.

[66] Miller v. Casey, 176 Mich. 221, 142 N. W. 589.

[67] Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56.

[68] Claflin v. Ambrose, 37 Fla. 78, 19 So. 628; American Nat. Bank v.

§ 282. **Intention.**—It depends mainly upon the intention of the parties, as shown by their conduct and dealings with reference to the land, the surrounding circumstances, and the use to which it is to be put, whether land purchased with partnership funds becomes partnership or individual property.[69] As said in a leading Michigan case:[70] "whether or not land taken in the name of one or more partners is in fact partnership property always depends upon the intent of the parties and the understanding and design under which they acted. It is clear that an express agreement may show this intent, but it may also be established by an implied agreement. This implied agreement may be gathered by considering the general purpose of the parties, the nature of their business and the manner in which they have dealt with the property in question." This rule is often applied where property stands in the name of individual partners.[71] And if the intention is to create partnership property, the fact that the firm did not pay taxes, insurance and repairs is not controlling.[72] The

Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406. Compare Winans v. Winans, 99 Mich. 74, 57 N. W. 1088.

[69] See cases cited in note 63, § 281. Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685; Reemsnyder v. Reemsnyder, 75 Kans. 565, 89 Pac. 1014; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; Woodward Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Thompson v. Holden, 117 Mo. 118, 22 S. W. 905; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Jones v. Beekman (N. J. Eq.), 47 Atl. 71; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263 (affg. 115 App. Div. 413, 100 N. Y. S. 869); Church v. Adams, 37 Ore. 355, 61 Pac. 639; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; note 27 L. R. A. 455-460.

[70] Johnson v. Hogan, 158 Mich 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889.

[71] Archer v. Barry, 23 Ky. L. 12, 62 S. W. 485; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Jones v. Beekman (N. J. Eq.), 47 Atl. 71; Barney v. Pike, 94 App. Div. 199, 87 N. Y. S. 1038; Hardin v. Hardin, 25 S. Dak. 601, 129 N. W. 108; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. 870.

[72] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E.

mere use of the land owned by one or both partners for partnership purposes will not make it partnership property, unless the partners so intend.[73] It would seem that land purchased with partnership funds would be held partnership property where the business of the partnership is to deal in real estate, yet it has been held that the intention to transform realty into personalty so as to create a partnership in it, must appear so clearly as to exclude every construction of the relation under which the property may be considered to retain its character of realty.[74] Nor is the mere fact that property, purchased by individual members of the partnership with their own funds, is carried on the partnership books, sufficient to change it into partnership property, where it was not used for partnership purposes.[75] But where the clear intention of the partners is to convert the land into personalty for all purposes that intention will be enforced.[76] It has even been held that it is unnecessary that the real estate was purchased with partnership funds, if there is manifest an intention for it to be firm property and the partners so treated it.[77] Realty not suitable for a partnership business and not intended to be used in it, will, it is held, not be considered an equitable asset of the firm merely because its owner verbally agreed for a consideration that it be so treated.[78] The former rule in Pennsylvania was that in order to render real estate partnership property as to strangers, there must be a writing evidencing such intention since it was considered that the matter came within the statute of frauds.[79]

221; Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. S. 767 (affd. 73 App. Div. 434, 77 N. Y. S. 138).

[73] See cases cited in preceding note, also Clark v. Lyster, 155 Fed. 513, 84 C. C. A. 27; Humes v. Higman, 145 Ala. 215, 40 So. 128; Blakeslee v. Blakeslee, 265 Ill. 48, 106 N. E. 470; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Starr v. Starr, 67 Misc. 305, 122 N. Y. S. 414.

[74] Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363.

[75] National Union Bank v. National Mechanics Bank, 80 Md. 371, 30 Atl. 913, 27 L. R. A. 476, 45 Am. St. 350.

[76] Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263 (affg. 115 App. Div. 413, 100 N. Y. S. 869).

[77] Blakeslee v. Blakeslee, 265 Ill. 48, 106 N. E. 470.

[78] Richtman v. Watson, 150 Wis. 385, 136 N. W. 797.

[79] Kepler v. Erie Dime Sav. &c. Co., 100 Pa. St. 602; In re McCormick's Appeal, 57 Pa. St. 59, 98 Am. Dec.

§ 283. Title in partners as individuals.—The common-law rule is that when real estate is conveyed to the partners individually and not as members of a partnership, they take title as tenants in common and hold the property in common, not as partnership property.[80] The presumption that property so conveyed is not partnership property does not apply where a clear intention is shown to treat the property as partnership property.[81] And if the property was purchased with partnership funds for partnership purposes, it is considered in equity as partnership property though conveyed to the partners as individuals.[82] In Pennsylvania as between the partners and third parties the common-law rule was strictly adhered to, and title to the property was determined entirely from the record,[83] but as between the partners the true facts governed.[84] A deed to partners individually vests in them, prima facie, undivided interests as tenants in common.[85]

191; Lancaster Bank v. Myley, 13 Pa. St. 544.

[80] Humes v. Higman, 145 Ala. 215, 40 So. 128; Grant v. Baumister, 160 Cal. 774, 118 Pac. 253; Richards v. Fraser, 136 Cal. 460, 69 Pac. 83; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Wilhite v. Boulware, 88 Ky. 169, 10 S. W. 629; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Starr v. Starr, 67 Misc. 305, 122 N. Y. S. 414; Schleissner v. Goldsticker, 135 App. Div. 435, 120 N. Y. S. 333; Harris v. De Raismes (N. J. Eq.), 58 Atl. 637; Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. S. 767 (affd. 73 App. Div. 434, 77 N. Y. S. 138; Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

[81] Hartnett v. Stilwell, 121 Ga. 386, 49 S. E. 276, 104 Am. St. 151; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Jones v. Beekman (N. J. Eq.), 47 Atl. 71.

[82] See note 80, this section. Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; Rockefeller v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. S. 78, 63 N. Y. St. 320; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987.

[83] Cundey v. Hall, 208 Pa. 335, 57 Atl. 761, 101 Am. St. 938; Stover v. Stover, 180 Pa. St. 425, 36 Atl. 921, 57 Am. St. 654.

[84] Stover v. Stover, 180 Pa. St. 425, 36 Atl. 921, 57 Am. St. 654; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987; Harris v. Rosenberg, 161 Pa. St. 367, 29 Atl. 44. The same rule prevailed where title to the property was in the name of one partner only, and his creditors could hold it as his individual property. Gwinner v. Union Trust Co., 226 Pa. 614, 75 Atl. 856.

[85] Grant v. Bannister, 160 Cal. 774, 118 Pac. 253.

If two partners purchase land in the name of one, they become equitable owners and equitable tenants in common.[86] Land purchased by two parties in the name of one of them, does not necessarily become the property of a partnership afterward entered into between them.[87] A deed to two persons as individuals prima facie conveys an undivided half interest to each, and although the grantees are partners in a commercial business, there is no presumption that the lands were partnership property.[88]

§ 284. Title in firm name.—The general rule is that where property is purchased with partnership funds, and the conveyance is made to the partnership in the firm name, without using the full name of any partner, the legal title does not pass to the partnership, but an equitable title passes.[89] It is usually held in such a case that the legal title is in the members of the partnership who hold it for the use and benefit of the firm.[90] If there is a deed to a partnership in a firm name which includes the name of one or more partners, those members designated by name take the legal title and hold the land for the benefit of the firm.[91] A conveyance to a partnership in a fictitious firm name which contains the name of no partners vests no legal title in it, but may be reformed in equity by inserting the true names of the

[86] Roach v. Roach (Ga.), 85 S. E. 703.

[87] Humes v. Higman, 145 Ala. 215, 40 So. 128; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Jones v. Dugan, 124 Md. 346, 92 Atl. 775.

[88] Lee v. Wysong, 128 Fed. 833, 63 C. C. A. 483.

[89] See cases cited in note 70, § 265. Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282, 135 Am. St. 168, 19 Ann. Cas. 947; La Fayette Land Co. v. Caswell, 59 Fla. 544, 52 So. 140, 138 Am. St. 166; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Close v. O'Brien, 135 Iowa 305, 112 N. W. 800; Taylor v. Dauley, 83 Kans. 646, 112 Pac. 595, 21 Ann. Cas. 1241; Hardin v. Hardin, 25 S. Dak. 601, 129 N. W. 108.

[90] Cole v. Mettee, 65 Ark. 503, 47 S. W. 407, 67 Am. St. 945; Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679; Adams v. Church, 42 Ore. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. 740; Mann v. Paddock, 108 Va. 827, 62 S. E. 951.

[91] See cases cited in notes 71, 72, § 265. Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600, 23 U. S. App. 154; Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362.

grantees.[92] It may be shown by parol that real estate is partnership property, whatever the manner in which the conveyance was made or the name in which title was taken.[93] This was not the rule in Pennsylvania.[94] Real estate conveyed to the partnership in payment of a debt becomes partnership property.[95]

§ 285. Land purchased by partnership dealing in real estate.—Generally, when the purpose of the partnership is dealing in real estate, land purchased by the partners is considered partnership stock in trade, as between the partners[96] and if purchased with partnership funds this rule holds although the land was conveyed to the partners individually as tenants in common[97] or title was taken in one partner's name.[98] It may be considered as personalty for all purposes, if the partners so intended.[99] And if a partnership for the sale of lands is formed, it extends to tracts of land not actually purchased, the purchase of which was contemplated in the undertaking[1] and one member of

[92] Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282, 135 Am. St. 168, 19 Ann. Cas. 947; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 4 Ann. Cas. 601, 111 Am. St. 805; Trexler v. Africa, 42 Pa. Super. Ct. 542; Wray v. Wray, 93 L. T. (N. S.) 304 (1905), 2 Ch. 349.

[93] In re Groetzinger, 127 Fed. 814, 62 C. C. A. 494 (affg. 110 Fed. 366); Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Kringle v. Rhomberg, 120 Iowa 472, 94 N. W. 1115; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. S. 767 (affd. 73 App. Div. 434, 77 N. Y. S. 138); Hardin v. Hardin, 25 S. Dak. 601, 129 N. W. 108; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

[94] Stover v. Stover, 180 Pa. St. 425, 36 Atl. 921, 57 Am. St. 654. See cases cited in note 79, § 282.

[95] Fretwell v. Branyon, 67 S. Car. 95, 45 S. E. 157.

[96] Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907.

[97] Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848.

[98] Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406.

[99] Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263 (affg. 115 App. Div. 413, 100 N. Y. S. 869).

[1] Kyle v. Griffin (W. Va.), 85 S. E. 559.

such a partnership is entitled to share in the profits of sales to the other members as individuals.[2]

§ 286. When real estate is partnership property—Summary.—Summing up the doctrine of the cases the general rule is that real estate purchased with partnership funds and used by the partners for partnership purposes or intended by them to be, and treated as, partnership property is regarded in equity as partnership property and is considered as personalty for partnership purposes, that is for paying the debts of the partnership and settling the rights of the partners between themselves.

§ 287. Partnership real estate—Uniform Partnership Act.—No feature of partnership law is changed so much by the Uniform Partnership Act as that relating to the holding of partnership real estate and its conveyance. It is provided[3] that: "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears." Title to such property may be conveyed by one partner in the partnership name, if within his agency for the purpose of the business,[4] or he may convey the equitable interest of the firm by a deed in his own name if within his authority[5] or if the real estate stands in his own name,[6] or may, if within the scope of his authority, pass the equitable interest by a conveyance in his name or the firm name, of firm property standing in the name of another partner or a third person,[7] and if title is in the name of all partners a conveyance by all of them passes all their rights.[8] Many of these rules are contrary to many holdings, but they will clarify the law

[2] Burns v. Russell Bros. (Tex. Civ. App.), 146 S. W. 707.
[3] Uniform Partnership Act, § 8 (3) (4).
[4] Uniform Partnership Act, § 10 (1).
[5] Uniform Partnership Act, § 10 (2).
[6] Uniform Partnership Act, § 10 (3).
[7] Uniform Partnership Act, § 10 (4).
[8] Uniform Partnership Act, § 10 (5).

in the states where the act is adopted. This act also runs counter to most American decisions in following the English rule of conversion of partnership real estate into personal property for all purposes.[8a]

§ 288. Equitable conversion of partnership realty into personalty—English rule.—Equitable conversion is a change in the nature of property whereby for certain purposes real property is considered personal or personal property as real. It seems to be an outgrowth of the maxim that equity regards that as done which ought to be done. As applied to partnership, there is an implied agreement that all firm property shall be liable for firm debts and each partner's share is a right to surplus assets, thus, at least so far as is necessary to pay firm debts or settle partnership matters, the firm property may be turned into money, and real estate acquired by the firm is impressed with the characteristic that it may be turned into money, so far as necessary to pay firm debts.[9] The established English rule, now enacted into statute, is that lands purchased with partnership funds and intended to be a part of the partnership property, are ipso facto, in equity, converted into personalty for all purposes, for the adjustment of partnership debts and claims, and for the purpose of determining the rights between the personal and real representatives of a deceased partner.[10] Mr. Lindley says:[11] "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the

[8a] Uniform Partnership Act, § 26, quoted in § 293 infra.

[9] Darby v. Darby, 3 Drew. 495, 25 L. J. Ch. 371, 2 Jur. (N. S.) 271, 4 W. R. 413.

[10] Eng. Partnership Act (1890), § 22; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Green v. Green, 1 Ohio 535, 13 Am. Dec. 642; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

[11] Lindley Partnership (8 ed.), pp. 406, 409.

real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties. * * * The doctrine of conversion merely amounts to this, that on the death of a partner his share in the partnership property is to be treated as money and not as land to those who claim under him." It has been said that the reason for this peculiar rule is to overcome the rule which excludes all but the eldest child from inheriting lands and exempt real estate in the hands of the heir from all but the specialty debts of the ancestor.[12] This doctrine applies in England only in the absence of any intention to the contrary.[13] The same rule is applied in Canada.[14]

§ 289. **Equitable conversion—American rule.**—Some early American cases followed the English rule of "out and out" conversion of partnership realty into personalty for all purposes, and in a few jurisdictions the rule seems to be followed yet.[15] In one case it was said that, to enable a surviving partner properly to wind up the business, he should have absolute authority to sell real estate; that if he can sell only so much as was necessary to pay debts, he would be hindered in finding a purchaser.[16] But the equitable conversion of partnership realty into personalty, otherwise than by agreement express or implied,[17] is not carried

[12] Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637.

[13] Lindley Partnership (8 ed.), 408; Stewart v. Blakeway, L. R. 4 Ch. 603; Wilson v. Holloway, 62 L. J. Ch. 781 (1893), 2 Ch. 340, 68 L. T. 785, 41 W. R. 684; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533.

[14] In re Fulton, 7 Ont. L. Rep. 445.

[15] 3 Kent. Com., pp. 37, 39; Hoxie v. Carr, 1 Summ. (U. S.) 173, Fed. Cas. 6802; Dickinson v. Dickinson, 29 Conn. 600; Sigourney v. Munn, 7 Conn. 11; Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 27 Ky. L. 505, 117 Am. St. 571; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Sumner v. Hampson, 8 Ohio 328, 23 Am. Dec. 722; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. 840; Pierce v. Trigg, 10 Leigh (Va.) 406.

[16] McAllister v. Montgomery, 3 Hay. (5 Tenn.) 94.

[17] See Partnership Realty, Burdick, 9 Col. Law Rev., p. 197. Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Davis v. Smith, 82 Ala. 198, 2 So. 897;

as far in the United States as in England,[18] it being here extended only to such a point as is required in order to satisfy the firm

Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Lowe v. Lowe, 13 Bush (Ky.) 688; Maddock v. Astbury, 32 N. J. Eq. 181; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263 (affg. 115 App. Div. 413, 100 N. Y. S. 869); Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. 840. See further Holmes v. Self, 79 Ky. 297, 2 Ky. L. (abstract) 322, 2 Ky. L. 380; Buck v. Winn, 11 B. Mon. (Ky.) 320; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Bank of Louisville v. Hall, 8 Bush (Ky.) 672; Wilhite's Admr. v. Boulware, 88 Ky. 169, 10 S. W. 629, 11 Ky. L. 59; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 405. See Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883 and note; Columb v. Read, 24 N. Y. 505; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Mallory v. Russell, 71 Ohio 63, 32 N. W. 102, 60 Am. Rep. 776; Rammelsberg v. Mitchell, 29 Ohio St. 22; In re Welles, 4 Lack. Leg. N. (Pa.) 135; In re Leaf's Appeal, 105 Pa. St. 505.

[18] "The English rule seems to be that when lands are acquired in the partnership name, with partnership funds, and for partnership purposes, equity will treat them as personalty for all purposes; but the better considered American cases hold that the lands thus acquired must be treated as personalty until the purposes of the partnership are accomplished, and then as realty with the attributes of a tenancy in common." Whisenhant v. Hybart, 160 Ala. 271, 49 So. 760. See further English Partnership Act, 1890 (53 & 54 Vic., ch. 39), §§ 20, 22; Selkrig v. Davies, 2 Dow. 230, 2 Rose 97, 14 R. R. 146; Sanborn v. Sanborn, 11 Grant's Ch. (Can.) 359; Broom v. Broom, 3 Myl. & K. 443; Phillips v. Phillips, 1 Myl. & K. 649, 1 L. J. Ch. 187; Crawshay v. Maule, 1 Swanst. 495, 1 Wils. 181, 18 R. R. 126; Attorney-General v. Hubbuck, 13 Q. B. Div. 275, 53 L. J. Q. B. 146, 50 L. T. 374; Houghton v. Houghton, 11 Sim. 491, 10 L. J. Ch. 310, 5 Jur. 528; Holroyd v. Holroyd, 28 L. J. Ch. 902, 7 W. R. 426; Essex v. Essex, 20 Beav. 442; Waterer v. Waterer, L. R. 15 Eq. 402, 21 W. R. 508; Murtagh v. Costello, L. R. 7 Ir. 428; Ripley v. Waterworth, 7 Ves. 425; Darby v. Darby, 3 Drew 495, 25 L. J. Ch. 371, 2 Jur. (N. S.) 271, 4 W. R. 413; Schleissner v. Goldsticker, 135 App. Div. (N. Y.) 435, 120 N. Y. S. 333; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637. And compare Custance v. Bradshaw, 9 Jur. 486, 4 Hare 315, 14 L. J. Ch. 358. See Partnership Realty, Burdick, 9 Col. Law. Rev., p. 197; Ashworth v. Munn, 15 Ch. Div. 363, 50 L. J. Ch. 107, 43 L. T. 553, 28 W. R. 965; Thornton v. Dixon, 3 Bro. C. C. 199; Bell v. Phyn, 7 Ves. Jr. 453, 458, 6 R. R. 148; Balmain v. Shore, 9 Ves. 500; Gray v. Smith, 43 Ch. Div. 208, 59 L. J. Ch. 145, 62 L. T. 335, 38 W. R. 310; Cookson v. Cookson, 8

obligations and to make an equitable distribution among the several partners themselves.[19]

§ 290. Equitable conversion—Various statements of American rule—Effect and limits.—The prevailing Ameri-

Sim. 529, 6 L. J. Ch. 337, 1 Jur. 621; Randall v. Randall, 7 Sim. 271, 4 L. J. Ch. 187; Ex parte M'Kenna, 3 De G., F. & J. 645, 30 L. J. Bk. 25; Berry v. Folkes, 60 Miss. 576. See also 8 Columbia Law Rev., 208; Partnership Realty, Burdick, 9 Col. Law Rev., pp. 197, 201 et seq.

[19] Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924; Marrett v. Murphy, Fed. Cas. No. 9103; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Kleine v. Shanks, Fed. Cas. No. 7870 (affd. 104 U. S. 18, 26 L. ed. 635); Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Hiscock v. Jaycox, Fed. Cas. No. 6531; Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583; Logan v. Greenlaw, 25 Fed. 299; In re Codding, 9 Fed. 849; Whisenant v. Hybart, 160 Ala. 271, 49 So. 760; Long v. Slade, 121 Ala. 267, 26 So. 31; Davis v. Smith, 82 Ala. 198, 2 So. 897; Brewer v. Browne, 68 Ala. 210; Causler v. Wharton, 62 Ala. 358; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Andrews' Heirs v. Brown's Admr., 21 Ala. 437, 56 Am. Dec. 252; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Percifull v. Platt, 36 Ark. 456; Beecher v. Stevens, 43 Conn. 587; Frink v. Branch, 16 Conn. 260; Price v. Hicks, 14 Fla. 565; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Morrill v. Colehour, 82 Ill. 618; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Mauck v. Mauck, 54 Ill. 281; Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Null v. Parsons, 145 Ill. App. 436; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Matlock v. Matlock, 5 Ind. 403; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Mallory v. Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776; Paton v. Baker, 62 Iowa 704, 15 N. W. 586; Hewitt v. Rankin, 41 Iowa 35; Sternberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Duncan v. Duncan, 93 Ky. 37, 13 Ky. L. 917, 18 S. W. 1022, 40 Am. St. 159; Flanagan v. Shuck, 82 Ky. 617, 6 Ky. L. 699; Spalding v. Wilson, 80 Ky. 589, 4 Ky. L. 575; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Lowe v. Lowe, 13 Bush (Ky.) 688; Graves v. Hardin, 21 Ky. L. 1499, 55 S. W. 679; Long v. Watts, 7 Ky. L. (abstract) 375; Casky v. Casky, 5 Ky. L. (abstract) 769; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Harris v. Harris, 153 Mass. 439, 26 N. E. 1117; Shearer v. Shearer, 98 Mass. 107; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579 (with which compare Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067); Godfrey v. White, 43 Mich. 171, 5 N. W. 243;

can doctrine is well expressed in a leading New York case:[19a] "The general doctrine of 'out and out' conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its

Arnold v. Wainwright, 6 Gil. (Minn.) 241, 80 Am. Dec. 448; Whitney v. Cotten, 53 Miss. 689; Scruggs v. Blair, 44 Miss. 406; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; Hogle v. Lowe, 12 Nev. 286; Campbell v. Campbell, 30 N. J. Eq. 415; Hill v. Beach, 12 N. J. Eq. 31; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Collumb v. Read, 24 N. Y. 505; Tarbel v. Bradley, 7 Abb. N. Cas. 273 (affd. 86 N. Y. 280); Rank v. Grote, 50 N. Y. Super. Ct. 275 (affd. 110 N. Y. 12, 17 N. E. 665); Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Hauptmann v. Hauptmann, 91 App. Div. (N. Y.) 197, 86 N. Y. S. 427; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; In re Welles, 191 Pa. St. 239, 43 Atl. 207; Moore v. Wood, 171 Pa. St. 365, 33 Atl. 63; Brown v. Beecher, 120 Pa. St. 590, 15 Atl. 608; West Hickory Min. Assn. v. Reed, 80 Pa. St. 38; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Moderwell v. Mullison, 21 Pa. St. 257; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Boyce v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Diggs v. Brown, 78 Va. 292; Rice v. Barnard, 20 Va. 479, 50 Am. Dec. 54; Martin v. Morris, 62 Wis. 418, 22 N. W. 525. And compare Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363; Rovelsky v. Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. 83; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Fooks v. Williams, 120 Md. 436, 87 Atl. 692; Rosenbaum v. New York, 59 Misc. 30, 109 N. Y. S. 775; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Lauffer v. Cavett, 87 Pa. St. 479; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; Pitts v. Spotts, 86 Va. 71, 9 S. E. 501. See note 37 L. R. A. (N. S.), p. 900.

[19a] Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637.

descendible quality when it is admitted on all hands that partnership real estate if the necessity arises is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties. The clear current of the American decisions supports the rule that in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is in equity deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation."

In an Iowa case it is held that partnership realty retains its character as such as between partners and the representatives of a deceased partner, the ownership of the partners being in the nature of both joint tenancy and tenancy in common, but that the legal title is held in trust for the firm and its creditors, and that

because impressed with a trust for the adjustment of partnership obligations, to that extent only is it regarded in equity as personalty.[20]

In Massachusetts the rule seems to be slightly different although similar in effect. There partnership realty is subject to firm debts, but is not held to be converted into personalty, it being in its character as realty impressed with a trust for the benefit of the partnership and partnership creditors.[21] Thus the general rule in this country is that dower rights,[22] and rights of inherit-

[20] Western Securities Co. v. Atlee (Iowa), 151 N. W. 56.

[21] Shearer v. Shearer, 98 Mass. 107.

[22] Brewer v. Browne, 68 Ala. 210; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Hunnicutt v. Summey, 63 Ga. 586; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Strong v. Lord, 107 Ill. 25; Simpson v. Leech, 86 Ill. 286; Bopp v. Fox, 63 Ill. 540; Pepper v. Pepper, 24 Ill. App. 316; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Hill v. Cornwall, 95 Ky. 512, 16 Ky. L. 97, 26 S. W. 540; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Ratcliffe v. Mason, 92 Ky. 190, 13 Ky. L. 551, 17 S. W. 438; Long v. Watts, 7 Ky. L. (abstract) 375; Goodburn v. Stevens, 5 Gill (Md.) 1; Howard v. Priest, 5 Metc. (Mass.) 582; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Wilcox v. Wilcox, 13 Allen (Mass.) 252; Free v. Beatley, 95 Mich. 426, 54 N. W. 910; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Willets v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Campbell v. Campbell, 30 N. J. Eq. 415; Uhler v. Semple, 20 N. J. Eq. 288; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Sage v. Sherman, 2 N. Y. 417; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Sparger v. Moore, 117 N. Car. 449, 23 S. E. 359; Blossom v. Van Amringe, 63 N. Car. 65; Ferguson v. Hass, 62 N. Car. 113; Stroud v. Stroud, 61 N. Car. 525; Summey v. Patton, 60 N. Car. 601, 86 Am. Dec. 451; Patton v. Patton, 60 N. Car. 572, 86 Am. Dec. 448; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Warfel v. Calder, 8 Lanc. Bar. (Pa.) 205; Reed v. Kennedy, 2 Strob. (S. Car.) 67; Bowman v. Bailey, 20 S. Car. 550; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Martin v. Smith, 25 W. Va. 579. See further Andrews' Heirs v. Brown's Admr., 21 Ala. 437, 56 Am. Dec. 252; Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; In re Ransom, 17 Fed. 331; Espy v. Comer, 76 Ala. 501; Drewry v. Montgomery, 28 Ark. 256; Gray v. Palmer, 9 Cal. 616; Price v. Hicks, 14 Fla. 565; Loubat v. Nourse, 5 Fla. 350; Hale v. Plummer, 6 Ind. 121; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Pepper v. Thomas, 85 Ky. 539, 9 Ky. L. 122, 4 S. W. 297; Bowler v. Blair, 6 Ky. L. (abstract) 666; Ellis v. Johnson, 4 Ky.

ance may be distinguished, subject to the meeting of such requirements, in real property contributed by a deceased partner.[23] Likewise the assessment of partnership realty as such, is proper.[24] So also where property has been purchased with partnership funds as real estate and it has been treated as such by the members of the firm who have sold and conveyed their individual shares independently of their associates, and there are no creditors to be considered, such property will be regarded as real es-

L. (abstract) 991; Burnside v. Merrick, 4 Metc. (Mass.) 537; Hamilton v. Halpin, 68 Miss. 99, 8 So. 739; Shipp v. Snyder, 121 Mo. 155, 25 S. W. 900; Duhring v. Duhring, 20 Mo. 174; Dawson v. Parsons, 10 Misc. 428, 63 N. Y. St. 320, 31 N. Y. S. 78 (affd. 11 App. Div. 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111); Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Hughes v. Allen, 66 Vt. 95, 28 Atl. 882; Martin v. Smith, 25 W. Va. 579. And compare Pugh v. Currie, 5 Ala. 446; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Fairchild v. Fairchild, 64 N. Y. 471. The absolute English rule, however, has found favor with the courts of Virginia. Pierce's Admr. v. Trigg's Heirs, 10 Leigh (Va.) 406-423; Deering & Co. v. Kerfoot's Exr., 89 Va. 491, 16 S. E. 671; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325. But compare Davis v. Christian, 15 Grat. (Va.) 11. So also it was adhered to in an early South Carolina decision, since overruled. Richardson's Exrs. v. Wyatt, 2 Desaus. (S. Car.) 471.

[23] Robertson v. Miller, 1 Brock. (U. S.) 466, Fed. Cas. No. 11926; Logan v. Greenlaw, 25 Fed. 299; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Carter v. Flexner, 92 Ky. 400, 13 Ky. L. 608, 17 S. W. 851; Goodburn v. Stevens, 5 Gill (Md.) 1; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Fairchild v. Fairchild, 64 N. Y. 471; Mendenhall v. Benbow, 84 N. Car. 646; Stroud v. Stroud, 61 N. Car. 525; Summey v. Patton, 60 N. Car. 601, 86 Am. Dec. 451; In re Welles, 191 Pa. St. 239, 43 Atl. 207; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Warfel v. Calder, 8 Lanc. Bar. (Pa.) 205; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Yeatman v. Woods, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452; Gaines v. Catron, 1 Humph. (Tenn.) 514; Piper v. Smith, 1 Head (Tenn.) 93; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Edgar v. Donnally, 2 Munf. (Va.) 387; Martin v. Morris, 62 Wis. 418, 22 N. W. 525. See further Lang v. Waring, 17 Ala. 145; Abernathy v. Moses, 73 Ala. 381; Pepper v. Pepper, 24 Ill. App. 316; Van Aken v. Clark, 82 Iowa 256, 48 N. W. 73; Marble v. Marble, 4 Ky. L. 360; Shearer v. Shearer, 98 Mass. 107; Dilworth v. Mayfield, 36 Miss. 40; Waugh v. Mitchell, 21 N. Car. 510. And compare Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Pepper v. Thomas, 85 Ky. 539, 9 Ky. L. 122, 4 S. W. 297; McAllister v. Montgomery, 3 Hayw. (Tenn.) 94.

[24] Hubbard v. Winsor, 15 Mich. 146.

tate and a claim against members of the firm by reason of the property, and the consequential lien, must be enforced against the property itself rather than against the partnership as such.[25] Even when this equitable conversion takes place, it is not of such a nature nor of such an extent that one partner thereby becomes vested with an implied power to dispose of the entire partnership interest in the property.[26] Nor is there a conversion so far as to relieve the partnership from compliance with the provision of the statute of frauds relating to the conveyance of real property.[27]

§ 291. **Interest of partner in firm property.**—But of whatever the firm property may consist, it is not subject as such to the assertion of present ownership and immediate possession by the partners as individuals,[28] and in making plain what interest an individual partner has in the common property, description will be more effective than attempted definition.[29] "The title to part-

[25] Smith v. Wood, 1 N. J. Eq. 74.

[26] Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

[27] Foster v. Barnes, 81 Pa. St. 377. See also Davis v. Christian, 15 Grat. (Va.) 11.

[28] "Neither partner separately owns, nor has the exclusive right of possession of, any particular articles of partnership property or aliquot part thereof. The real ownership and legal title are vested in the firm." Fuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756. And see Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Taylor v. Farmer (Ill.), 4 N. E. 370; Taft v. Schwamb, 80 Ill. 289; Robinson v. Winn, 4 Ky. L. (abstract) 54; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; United States v. Baulos' Exr., 5 Mart. (N. S.) (La.) 567; Ward v. Brandt, 11 Mart. (O. S.) (La.) 331, 31 Am. Dec. 352; Claiborne v. Their Creditors, 18 La. 501; Stockwell v. Brewer, 59 Maine 286; Day v. Stafford, 128 Mo. App. 438, 107 S. W. 433; Spurr v. Russell, 59 N. H. 338; Daniel v. Crowell, 125 N. Car. 519, 34 S. E. 684; Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370; Liberty Sav. Bank v. Campbell, 75 Va. 534.

[29] "In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property; but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of partnership property, and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved."

nership property is not in the individual members of the firm so that either may assign or transfer to another an undivided share in any specific articles, but it is in the firm as an entirety, subject to the right of the partners to have it applied to the payment of the debts of the firm and the equities of the partners."[30] Thus it may be stated that each member of the firm has an interest in the firm property which is hardly more than a chose in action,[31] an

Lindley Partnership, *339. And see Milligan v. Mackinlay, 209 Ill. 358, 70 N. E. 685; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Pilcher's Succession, 39 La. Ann. 362, 1 So. 929; Smith v. McMicken, 3 La. Ann. 319; Lambert v. Griffith, 50 Mich. 286, 15 N. W. 458; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Gaines v. Coney, 51 Miss. 323; Williams v. Gage, 49 Miss. 777; Whitmore v. Shiverick, 3 Nev. 288; Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77; Strauss v. Frederick, 91 N. Car. 121; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Sweeney v. Horn, 7 Pa. Dist. 391; Kramer v. Arthurs, 7 Pa. St. 165; Hines v. Dean, 1 White & W. (Tex.) Civ. App. Cas. Ct. App., § 690; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

[30] Costello v. Costello, 209 N. Y. 252, 103 N. E. 148. See also Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. 225.

[31] "The interest of each member of a partnership extends to every portion of its property." McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907. "The interest of a partner in the partnership estate only attaches after dissolution of the partnership in the residuum for the payment and satisfaction of partnership liabilities." Blake v. Sargent, 152 Fed. 263. "The interest of each partner in the partnership property is his share of the surplus after payment of all partnership debts and settlement of all accounts between himself and his partners." Jones v. Way, 78 Kans. 535, 97 Pac. 437, 18 L. R. A. (N. S.) 1180n. "A partner can not commit larceny of the funds or property of the partnership of which he is a member because the interest or ownership of such partner extends to every portion of its property. Rev. Codes, § 5469." State v. Brown, 38 Mont. 309, 99 Pac. 954. To the same effect Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; In re Rice, 164 Fed. 509; Filley v. Phelps, 18 Conn. 294; Taft v. Schwamb, 80 Ill. 289; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Taylor v. Farmer (Ill.), 4 N. E. 370; Null v. Parsons, 145 Ill. App. 436; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Henry v. Anderson, 77 Ind. 361; Meridian Nat. Bank v. Brandt, 51 Ind. 56; Matlock v. Matlock, 5 Ind. 403; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Mayer v. Garber, 53 Iowa 689, 6 N. W. 63; Ward v. Brandt, 11 Mart. (O. S.) (La.) 331, 13 Am. Dec. 352; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; United States v. Baulos' Exr., 5 Mart. (N. S.) (La.) 567; Claiborne v. Their

interest somewhat uncertain in its value,[32] subject to levy of attachment or execution for his individual debt,[33] to his mort-

Creditors, 18 La. 501; Douglas v. Winslow, 20 Maine 89, 2 Appleton (Maine) 89; Millaudon v. New Orleans &c. R. Co., 3 Rob. (La.) 488; Gay v. Ray, 195 Mass. 8, 80 N. E. 693; Arnold v. Wainwright, 6 Minn. 358 (Gil. 241), 80 Am. Dec. 448; Schalck Fenske v. Harmon, 6 Minn. 265 (Gil. 176); Staats v. Bristow, 73 N. Y. 264; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522 (revd. 20 Johns. (N. Y.) 611); Hauptmann v. Hauptmann, 91 App. Div. (N. Y.) 197, 86 N. Y. S. 427; Allison v. Davidson, 17 N. Car. 79; Place v. Sweetzer, 16 Ohio 142; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; McManus v. Cash, 101 Tex. 261, 108 S. W. 800; Warren v. Wheelock, 21 Vt. 323; Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985. But see Stevens v. Stevens, 39 Conn. 474; Hewitt v. Rankin, 41 Iowa 35; Whitmore v. Shiverick, 3 Nev. 288; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Berry v. Kelly, 27 N. Y. Super. Ct. 106; Appeal of Baker, 21 Pa. St. 76, 59 Am. Dec. 752; Boyce v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25.

[32] This, by reason of the fact that the amount and value of firm property at any given future time is uncertain. See Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985, wherein it is stated that "until that occurs, [the payment of partnership debts and the settlement of partnership accounts] it is impossible to determine the extent of his interest."

[33] Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Johnson v. Rogers, 15 Nat. Bankr. Reg. 2, 13 Fed. Cas. No. 7408; Stevens v. Stevens, 39 Conn. 474; Rice v. McMartin, 39 Conn. 573; Witter v. Richards, 10 Conn. 37; Weber v. Hertz, 188 Ill. 68, 58 N. E. 676; Hurlbut v. Johnson, 74 Ill. 64; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; State v. Emmons, 99 Ind. 452; Burgess v. Atkins, 5 Blackf. (Ind.) 337; Aldrich v. Wallace, 8 Dana (Ky.) 287, 33 Am. Dec. 495; White v. Woodward, 8 B. Mon. (Ky.) 484; Bank of Louisville v. Hall, 8 Bush (Ky.) 672; Williams v. Smith, 4 Bush (Ky.) 540; Lee v. Bullard, 3 La. Ann. 462; Cunningham v. Gushee, 73 Maine 417; Fogg v. Lawry, 68 Maine 78, 28 Am. Rep. 19; Crabtree v. Clapham, 67 Maine 326; Hacker v. Johnson, 66 Maine 21; Crooker v. Crooker, 46 Maine 250; Bradbury v. Smith, 21 Maine 117; Commercial Bank v. Wilkins, 9 Greenl. (Maine) 28; Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. 432; Breck v. Blair, 129 Mass. 127; Davis v. Werden, 13 Gray (Mass.) 305; Peck v. Fisher, 7 Cush. (Mass.) 386; Lord v. Baldwin, 6 Pick. (Mass.) 348; Haynes v. Knowles, 36 Mich. 407; Day v. McQuillan, 13 Gil. (Minn.) 192; First Nat. Bank v. Brenneisen, 97 Mo. 145, 10 S. W. 884; Fleisher v. Hinde (Mo.), 93 S. W. 1126 (affd. 122 Mo. App. 218, 99 S. W. 25); Lester v. Givens, 74 Mo. App. 395; Deickmann v. St. Louis, 9 Mo. App. 9; Carillon v. Thomas, 6 Mo. App. 574; Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304; Newman v. Bean, 21 N. H. 93; Curran v. Kendall Boot &c. Co., 8 N. Mex. 417, 45 Pac. 1120; Staats v. Bristow, 73 N. Y. 264; Sterrett v. Third Nat. Bank, 46 Hun (N. Y.) 22, 10 N. Y. St. 818 (affd.

gage,[34] to a mechanic's lien,[35] to injunction by a personal creditor,[36]

122 N. Y. 659, 25 N. E. 913, 3 Silv. Ct. App. 136); Ryder v. Carpenter, 8 N. Y. Wkly. Dig. 25; Davis v. Delaware &c. Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. 418; Watt v. Johnson, 49 N. Car. 190; Latham v. Simmons, 48 N. Car. 27; Flanner v. Moore, 47 N. Car. 120; Vann v. Hussey, 46 N. Car. 381; McPherson v. Pemberton, 46 N. Car. 378; Blevins v. Baker, 33 N. Car. 291; Jarvis v. Hyer, 15 N. Car. 367; Sellew v. Chrisfield, 1 Handy (Ohio) 86, 12 Ohio Dec. 41; Buchanan v. Mitchell, 8 Ohio Dec. 437, 8 Cin. L. Bul. 8; Adams v. James L. Leeds Co., 195 Pa. St. 70, 45 Atl. 666; Sweeney v. Girolo, 154 Pa. St. 609, 26 Atl. 600; Lothrop v. Wightman, 41 Pa. St. 297; In re Cooper's Appeal, 26 Pa. St. 262; In re Brown's Appeal, 17 Pa. St. 480; Knox v. Summers, 4 Yeates (Pa.) 477; Wood v. Witherow, 8 Phila. (Pa.) 517; Roop v. Rodgers, 5 Watts (Pa.) 193; Morgan v. Watmough, 5 Whart. (Pa.) 125; Crowningshield v. Strobel, 2 Brev. (S. Car.) 80; Knox v. Schepler, 2 Hill (S. Car.) 595; McHaney v. Cawthorn, 4 Heisk. (Tenn.) 508; Grant v. Williams, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 363; Schley v. Hale, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 930; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481; Bolin v. Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. 898. See further Green v. Pyne, 1 Ala. 235; Peck v. Schultze, 1 Holmes (U. S.) 28, Fed. Cas. No. 10895; Johnson v. Sanford, 13 Conn. 461; Green v. Ross, 24 Ga. 613; Hill v. Bell, 111 Mo. 35, 19 S. W. 959; Wiles v. Maddox, 26 Mo. 77; Lester v. Givens, 74 Mo. App. 395; In re Kelly's Appeal, 16 Pa. St. 59; Brady v. Conway, 3 Wkly. Notes Cas. (Pa.) 110; Powers v. Powers, 69 Wis. 621, 2 Am. St. 767, 35 N. W. 53. And compare Edwards v. Hughes, 20 Mich. 289; Cook v. Arthur, 33 N. Car. 407.

[34] Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985.

[35] "As a partner he was liable to creditors of the firm for all its debts —the entire debt, not a portion of it, and his title in the firm's realty must be taken to be a fee simple absolute to the whole, though he share his interest with another; and, whatever that may be worth, it is subject to the lien granted by the statute, in obedience to the express command of the Constitution, for the improvements placed thereon by his consent, and when the proper steps have been taken the lien attaches to the rem as against subsequent purchasers." De Soto Nat. Bank v. Arcadia Elec. Light &c. Co., 57 Fla. 391, 48 So. 745.

[36] Rev. Laws of Mass., ch. 159, § 3, cl. 7; Gay v. Ray, 195 Mass. 8, 80 N. E. 693. Partners whose interests have been jeopardized by the sale of a copartner's interest under execution may enjoin a further disposition of the property by the purchaser thereof. White v. Woodward, 8 B. Mon. (Ky.) 484. Compare Williams v. Smith, 4 Bush (Ky.) 540.

and to sale by him either to a copartner,[37] or a third person.[38]

[37] Bradbury v. Barnes, 19 Cal. 120; Gondolfo v. Garbarino, 8 Cal. App. 546, 97 Pac. 203; Van Aken v. Clark, 82 Iowa 256, 48 N. W. 73; Christen v. Ruhlman, 22 La. Ann. 570; Richardson v. Davis, 70 Miss. 219, 11 So. 790; Love v. Van Every, 18 Mo. App. 196; Bigham v. Tinsley, 149 Mo. App. 467, 130 S. W. 506 (opinion adopted in Bigham v. Tinsley, 160 Mo. App. 605, 140 S. W. 1193); Reese v. Kinkead, 18 Nev. 126, 1 Pac. 667; Wright v. Duke, 91 Hun (N. Y.) 409, 36 N. Y. S. 853, 72 N. Y. St. 375; In re Weir, 59 Misc. (N. Y.) 320, 112 N. Y. S. 278; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Kaufmann v. Kaufmann, 222 Pa. 58, 70 Atl. 956; Yost v. Critcher, 112 Va. 870, 72 S. E. 594. See further Warden v. Marcus, 45 Cal. 594; Chandler v. Sherman, 16 Fla. 99; Lantz v. Ryman, 102 Iowa 348, 71 N. W. 212; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Howe v. Bristow, 65 Mo. App. 624; Abbe v. Clark, 31 Barb. (N. Y.) 238; White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Jarecki v. Hays, 161 Pa. St. 613, 29 Atl. 118; Norris & Bro. v. Vernon, 8 Rich. L. (S. Car.) 13; Smith v. Smith, 30 Vt. 139; Fisher v. Vaughn, 75 Wis. 609, 44 N. W. 831.

[38] Simmons v. Rowe, 4 Cal. App. 752, 89 Pac. 621; Union Brewing Co. v. Inter-State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Givens v. Berry, 21 Ky. L. 680, 52 S. W. 942; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; Savag v. Putnam, 32 Barb. (N. Y.) 420 (affd. 32 N. Y. 501); Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82. See also Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Jackson v. Stanford, 19 Ga. 14; Union Brewing Co. v. Inter-State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997; Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84; Glynn v. Phetteplace, 26 Mich. 383; Day v. Stafford, 128 Mo. App. 438, 107 S. W. 433; Treadwell v. Williams, 9 Bosw. (N. Y.) 649; Mills v. Pearson, 2 Hilt. (N. Y.) 16; Carlisle Gas &c. Co. v. Carlisle Borough, 218 Pa. 554, 67 Atl. 844; Swoope v. Wakefield, 10 Pa. Super. Ct. 342; McGlensey v. Cox, 1 Phila. (Pa.) 387; Seibert v. Seibert, 1 Brewst. (Pa.) 531; Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742. "It is conceded by the parties to the suit that purchasers of the share of an individual partner can only take his interest, and that interest consists in the vendor's share of the surplus, which remains after the payment of the partnership debts and the settlement of accounts between the partners. * * * This is the law, and it follows that where one partner transfers his interest in the partnership to a third person, such purchase does not make the buyer a partner in the firm without the concurrence of the other partners, and the purchaser has only a right of accounting." Bloodworth v. Booser, 99 Ark. 238, 138 S. W. 457; Reece v. Hoyt, 4 Ind. 169; Merrick v. Brainard, 38 Barb. (N. Y.) 574; Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216, Ann. Cas. 1912 D, 1205n. A partner disposing of his right, title

§ 292. Interest of partner in firm property further considered.—It is said in several cases, in effect, that the interest of a partner in the firm property is a right to share in the surplus after the firm debts are paid, and the partner's equities adjusted among themselves,[39] that such right is a property which can be sold by a transfer of interest to a copartner or stranger,[40] that since such interest may be seized under legal process, and may be mortgaged, it must be considered property.[41] But no single partner can transfer an undivided interest in any particular piece of firm property;[42] nor, so it seems, will the offer, in attachment or execution against an individual partner, of title to the whole of specific firm articles, be valid.[43] The defendant's intan-

and interest in and to partnership property divests himself, but not the firm, of title thereto. Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917.

[39] Staats v. Bristow, 73 N. Y. 264; Costello v. Costello, 103 N. E. 148, 209 N. Y. 252 (affg. judgment 137 N. Y. S. 132, 152 App. Div. 280); Eilers Music House v. Reine, 133 Pac. 788, 65 Ore. 598; King v. Board of Canvassers &c. Providence (R. I.), 92 Atl. 569; Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832.

[40] Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832.

[41] King v. Board of Canvassers &c. Providence (R. I.), 92 Atl. 569.

[42] Dickinson v. Matheson Motor Car Co., 161 Fed. 874; Nichol v. Stewart, 36 Ark. 612; Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Simmons v. Rowe, 4 Cal. App. 752, 89 Pac. 621; Pratt v. McGuinness, 173 Mass. 170, 53 N. E. 380; Ewart v. Nave-McCord Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Gilbert v. Howard Automatic Mach. Co., 147 N. Car. 308, 61 S. E. 176; Strauss v. Frederick, 91 N. Car. 121; Kenneweg v. Schilansky, 45 W. Va. 521, 31 S. E. 949. But compare Gross v. Gross, 128 App. Div. (N. Y.) 429, 112 N. Y. S. 790.

[43] Daniel v. Owens, 70 Ala. 297; Church v. Knox, 2 Conn. 514; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; Stumph v. Bauer, 76 Ind. 157; Branch v. Wiseman, 51 Ind. 1; Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213; Levy v. Cowan, 27 La. Ann. 556; Marston v. Dewberry, 21 La. Ann. 518; Pittman v. Robicheau, 14 La. Ann. 108; Carvin v. Bates, 10 La. Ann. 756; Smith v. McMicken, 3 La. Ann. 319; Tennessee Bank v. McKeage, 11 Rob. (La.) 130; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Sirrine v. Briggs, 31 Mich. 443; Blumenfeld v. Seward, 71 Miss. 342, 14 So. 442; Sanders v. Young, 31 Miss. 111; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson v. Stevens, 7 N. H. 352; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Wayt v. Peck, 9 Leigh (Va.) 434; Heydon v. Heydon, 1 Salk. 392. See further Bachurst v. Clinkard, 1 Show. 173; Eddie v. Davidson, 2 Doug. 650, 17 Ves. 193, 1 Rose 213, 11 R. R. 56; Felt v. Cleghorn, 2 Colo.

gible "interest"[44] is alone amenable to such judicial process,[45] though possibly it may be proper to confine the sale to this interest as embodied in particularized property.[46] Nor has a partner the right to a division of property in kind.[47] The interest of a partner in partnership real estate the legal title to which was in the firm, has been held to make him a "freeholder," qualified to sign certain petitions as such.[48] Though the interest of partners is joint, they are not joint tenants, since there is no right of sur-

App. 4, 29 Pac. 813; Brewster v. Hammet, 4 Conn. 540; Spalding v. Black, 22 Kans. 55; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Haynes v. Knowles, 36 Mich. 407; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Wiles v. Maddox, 26 Mo. 77; Lester v. Givens, 74 Mo. App. 395; Wright v. Radcliffe, 61 Mo. App. 257; Treadwell v. Brown, 43 N. H. 290; Tappan v. Blaisdell, 5 N. H. 190; In re Smith, 16 Johns. (N. Y.) 102; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Atkins v. Saxton, 77 N. Y. 195; Jarvis v. Hyer, 15 N. Car. 367; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

[44] See ante, notes 30, 33.

[45] Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; Brewster v. Hammet, 4 Conn. 540; White v. Jones, 38 Ill. 159; Edgar v. Caldwell, 1 Morr. (Iowa) 434; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Sanders v. Young, 31 Miss. 111; Wiles v. Maddox, 26 Mo. 77; Atkins v. Saxton, 77 N. Y. 195; In re Smith, 16 Johns. (N. Y.) 102; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Doner v. Stauffer, 1 P. & W. (Pa.) 198, 21 Am. Dec. 370; Bachurst v. Clinkard, 1 Show. 173. See further United States v. Williams, Fed. Cas. No. 16719, 4 McLean (U. S.) 236; Vandike v. Rosskam, 67 Pa. St. 330; Conniff v. Doyle, 8 Phila. (Pa.) 630; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Cox v. Russell, 44 Iowa 556; Hacker v. Johnson, 66 Maine 21; Kunze v. Cox, 113 Mich. 546, 71 N. W. 864, 67 Am. St. 480; Lucas v. Laws, 27 Pa. St. 211; Snell v. Crowe, 3 Utah 26, 5 Pac. 522.

[46] Felt v. Cleghorn, 2 Colo. App. 4, 29 Pac. 813; Hershfield v. Claflin, 25 Kans. 166, 37 Am. Rep. 237; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Phillips v. Cook, 24 Wend. (N. Y.) 389; Dutton v. Morrison, 17 Ves. Jr. 193, 1 Rose 213, 11 R. R. 56; Waters v. Taylor, 2 Ves. & B. 299. See further Lester v. Givens, 74 Mo. App. 395.

[47] Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Mendenhall v. Benbow, 84 N. Car. 646; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Wild v. Milne, 26 Beav. 504. Compare Molineaux v. Reynolds, 54 N. J. Eq. 559, 35 Atl. 536.

[48] Tattersall v. Nevels, 77 Nebr. 843, 110 N. W. 708.

vivorship in the property, further than to close up the business[49] and one partner may sell his interest or all the assets in his co-partner's lifetime. Nor are partners tenants in common of partnership property, for one partner's sale of his interest does not pass an undivided interest in the property, but only a share in the surplus after the property is sold and firm debts are paid.[50] A levy of a judgment on a partner's share conveys no more than the right to his share in the surplus[51] and the levy of an execution by an individual creditor of a partnership on firm property gives him only a lien on the partner's share, not on the partnership title,[52] while one partner's sale of partnership property as such, passes title to the whole of it, not an undivided interest of the seller.[53] The Uniform Partnership Act defines this peculiar interest of a partner in partnership property as tenancy in partnership.

§ 293. Tenancy in partnership—Uniform Partnership Act. —The drafters of the Uniform Partnership Act in dealing with rights of one partner in firm property and the nature of his interest, have seen fit to create a new term for the nature of the partner's

[49] Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Donnell v. Harshe, 67 Mo. 170; Buckley v. Barber, 6 Exch. 164; Knox v. Gye, 42 L. J. Ch. 234, L. R. 5 H. L. 656; Pollock Partnership, ch. 6, art. 27.

[50] See cases cited in notes 37 and 38 ante; Sindelar v. Walker, 137 Ill. 43, 27 N. E. 59, 31 Am. St. 353; Thompson v. Spittle, 102 Mass. 207; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; In re Collins' Appeal, 107 Pa. St. 590, 27 Am. Rep. 479.

[51] Sanborn v. Royce, 132 Mass. 594; Taylor v. Fields, 4 Ves. 396.

[52] Branch v. Wiseman, 51 Ind. 1; Johnson v. Wingfield (Tenn.), 42 S. W. 203; Skavdale v. Moyer, 21 Wash. 10, 26 Pac. 841, 46 L. R. A. 481; Heydon v. Heydon, 1 Salk. 392; Johnson v. Evans, 7 Man. & G. 240, 13 L. J. C. P. 117, 8 Jur. 340. See also Daniel v. Owens, 70 Ala. 297; Lane v. Lanfest, 40 Minn. 375, 42 N. W. 84; Atkins v. Saxton, 77 N. Y. 195; Smith v. Jones, 18 Nebr. 481, 25 N. W. 624; and the firm may sell the property levied on, for firm debts and give perfect title. See Garbett v. Veale, D. & M. 345, 5 Q. B. 408, 13 L. J. Q. B. 98, 8 Jur. 335; Staats v. Bristow, 73 N. Y. 264; In re Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149.

[53] Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Person v. Wilson, 25 Minn. 189; Mersereau v. Norton, 15 Johns. (N. Y.) 179; Thursby v. Lidgerwood, 69 N. Y. 198.

holding defining it as "tenancy in partnership." This seems to be rather a change in the name of the partner's right in specific firm property, rather than a change in the generally accepted law regarding the nature of such right, although it is contrary to some decisions on the border-line of the old general rules, and it makes a very great change in the law as to the rights of a partner's individual creditors in firm property. Some provisions of the act follow: Sec. 24. (Extent of Property Rights of a Partner.) The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. Sec. 25. (Nature of a Partner's Right in Specific Partnership Property.) (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. (2) The incidents of this tenancy are such that: (a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners. (b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property. (c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, can not claim any right under the homestead or exemption laws. (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representatives. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose. (e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs,

or next of kin. Sec. 26. (Nature of Partner's Interest in the Partnership.) A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

§ 294. **Possession of firm property.**—Partners are joint owners of the firm property and have a joint and common possession, each partner having an equal right to possession of all the property and the possession of one is the possession of each and all.[54] One partner has no right to exclude the other from possession.[55] A partner who withholds possession of the partnership property from a copartner, will be held in equity to pay him the value of the use of the property so withheld,[56] but he has no rights in a possessory action at common law.[57] One partner has no right to take possession of the partnership property because the firm is in debt.[58] Nor has the receiver of an absconding partner, in the absence of waste or fraud, the right to dispossess of the partnership property the other member of the firm.[59] If one partner has furnished stock and the other does the work and the working partner absconds, his copartner is entitled to possession of the entire stock subject to the claims of the other partner's creditors against his share.[60]

[54] Robinson v. Winn, 4 Ky. L. 54 (abstract); Johnson v. Brandt, 10 Mart. (O. S.) (La.) 638; Johnson v. Aston, 1 Sim. & L. 73, 1 Eng. Ch. 73; Reg. v. Bennett, 27 Ont. 314.

[55] Dugger v. Tutwiler, 129 Ala. 258, 30 So. 91; Buckley v. Carlisle, 2 Cal. 420; Carithers v. Jarrell, 20 Ga. 842; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Stewart v. Millsaps (La.), 23 So. 887; Hamill v. Hamill, 27 Md. 679; Monbray v. Monbray, 157 N. Y. 712, 53 N. E. 1128 (affg. 3 App. Div. 227, 38 N. Y. S. 439); Azel v. Betz, 2 E. D. Smith (N. Y.) 188; Robinson v. Gilfillan, 15 Hun (N. Y.) 267; Browning v. Cover, 108 Pa. 595; Reg. v. Mason, 28 Ont. 495.

[56] Adams v. Kable, 45 Ky. (6 B. Mon.) 384, 44 Am. Dec. 772; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770; Monbray v. Monbray, 157 N. Y. 712, 53 N. E. 1128; Blisset v. Daniel, 1 Eq. Rep. 484, 10 Hare 493, 18 Jur. 122, 68 Eng. Reprint 1022.

[57] Buckley v. Carlisle, 2 Cal. 420; Robinson v. Gilfillan, 15 Hun (N. Y.) 267; Smith v. Stokes, 1 East 363; Smith v. Book, 5 U. C. Q. B. (O. S.) 556; Fox v. Hanbury, Cowp. 445.

[58] Carithers v. Jarrell, 20 Ga. 842.

[59] Hamill v. Hamill, 27 Md. 679.

[60] Boynton v. Page, 13 Wend. (N. Y.) 425.

§ 295. Proportionate shares of partners.—In the absence of any agreement between the partners whereby it is provided in what proportion each member of the firm shall be deemed to be interested in the partnership property, there exists a rebuttable presumption that the interests of the several members of the firm are equal.[61] As said in one case.[62] "Where there is no specific agreement between partners as to their respective interests in the profits and losses of the firm, the law presumes them to be equal, unless, from the facts and circumstances of the case, it is apparent to the court that some other division was intended by the members of the firm." Unless this presumption is overthrown by evidence it will control in the distribution of firm profits[63] and the sharing of losses[64] or additional contributions to capital necessary to further carry out the original business planned.[65] But where a partner abandons his contract, this presumption of equal interest fails altogether.[66] Again it will not

[61] Stein v. Robertson, 30 Ala. 286; Wallace v. Hull, 28 Ga. 68; Roach v. Perry, 16 Ill. 37; Farr v. Johnson, 25 Ill. 522; Moore v. Bare, 11 Iowa 198; Commonwealth v. Bracken, 17 Ky. L. 785, 32 S. W. 609; Crabtree v. Clapham, 67 Maine 326; Randle v. Richardson, 53 Miss. 176; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Worthy v. Brower, 93 N. Car. 344; In re Richard's Estate, 1 Woodw. Dec. (Pa.) 362; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713. See also Demain v. Huston, 70 W. Va. 306, 73 S. E. 923; Hollingsworth v. Cameron (Tex. Civ. App.), 160 S. W. 644.

[62] Safe Deposit & Trust Co. v. Turner, 98 Md. 22, 55 Atl. 1023 (citing Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384).

[63] Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Turnipseed v. Goodwin, 9 Ala. 372; Donelson v. Posey, 13 Ala. 752; Griggs v. Clarke, 23 Cal. 427; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Avritt v. Russell, 22 Ky. L. 752, 58 S. W. 811; Wolfe v. Gilmer, 7 La. Ann. 583; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Wingarden v. Verhage, 68 Mich. 14, 35 N. W. 801; Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Ratzer v. Ratzer, 28 N. J. Eq. 136; Taylor v. Taylor, 6 N. Car. 70; Jones v. Jones, 36 N. Car. 332; Keys v. Baldwin, 10 Ohio Dec. 271, 19 Wkly. L. Bul. (Ohio) 376; Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054. Compare Towner v. Lane's Admr., 9 Leigh (Va.) 262.

[64] Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569.

[65] Jackson v. Jackson, 224 Fed. 888.

[66] Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258.

be indulged so as to confer upon a partner the right to share in fees received by his copartner for services as administrator, notwithstanding the fact that the latter "intended" that the amount which he thus earned should be divided between himself and his associate.[67] Moreover under no circumstances, is this presumption to militate against the right of those entering into a partnership agreement, to make whatever express provisions they may choose in regard to the distribution of profits resulting from their association.[68]

§ 296. Dower and homestead rights in partnership real estate.—Naturally, the right of a widow to dower in partnership real estate is measured largely by the extent of her husband's rights, so real estate purchased with partnership funds and used for partnership purposes must be subjected to the payment of partnership debts, and of liabilities between the partners, before the widow of a deceased partner can claim dower[69] and is

[67] King v. Whiton, 15 Wis. 684. See also Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478.

[68] Dumont v. Ruepprecht, 38 Ala. 175; Pond v. Clark, 24 Conn. 370; Plunkett v. Dillon, 4 Houst. (Del.) 338; Appeal of McIntire, 118 Pa. St. 421, 11 Atl. 784.

[69] See cases cited, note 22, § 290; Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; In re Perlhefter, 177 Fed. 299; Holton v. Gwin, 65 Fed. 450; Brewer v. Browne, 68 Ala. 210; Andrews v. Brown, 21 Ala. 437, 56 Am. Dec. 252; Lenow v. Fones, 48 Ark. 557; Gray v. Palmer, 9 Cal. 616; Loubat v. Nourse, 5 Fla. 350; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Bopp v. Fox, 63 Ill. 540; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Bennett v. Bennett, 137 Ky. 17, 121 S. W. 495, Ann. Cas. 1912 A, 407 and note; Cornwall v. Cornwall, 6 Bush (Ky.) 369; Goodburn v. Stevens, 1 Md. Ch. 420; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Free v. Beatley, 95 Mich. 426, 54 N. W. 910; Sykes v. Sykes, 49 Miss. 190; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Willet v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Cilley v. Huse, 40 N. H. 358; Uhler v. Semple, 20 N. J. Eq. 288; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228 (affg. 46 Hun 675, 11 N. Y. St. 235); Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 167, 47 Am. Dec. 305; Patton v. Patton, 60 N. Car. 572, 86 Am. Dec. 448; Sumner v. Hampsen, 8 Ohio 328, 32 Am. Dec. 722; In re Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Mowry v. Bradley, 11 R. I. 370; Lyon v. Lyon, 1 Tenn. Ch. 225; Pierce v.

practically the same as the right of the creditors and heirs of her deceased husband.[70] "When all the claims against the partnership have been satisfied, the partnership account adjusted and the object of the trust (for the partnership use) fulfilled, in a case where the partners have not either by an express or implied agreement indicated an intention to convert their lands into personal estate, no solid reason can be assigned, why the real estate should not be treated, in a court of equity, as at law, according to its real nature, and consequently chargeable with the widow's dower."[71] The widow has no inchoate right to dower in the partnership real estate as such.[72] In a few jurisdictions, however, the wife of a partner has been held a necessary party to a conveyance of firm real estate.[73] A husband

Trigg, 10 Leigh (Va.) 406; Martin v. Smith, 25 W. Va. 579.

[70] Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697.

[71] Goodburn v. Stevens, 5 Gill (Md.) 1. "The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion, so far as necessary for the purpose of the partnership, but otherwise it retains its legal character and incidents. It is in equity, chargeable with the debts of the copartnership, and any balance which may be due from one copartner to another, on the winding up of the affairs of the firm and as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining, after paying the debts and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims." Campbell v. Campbell, 30 N. J. Eq. 415.

[72] Welch v. McKenzie, 66 Ark. 251, 50 S. W. 505; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. S. 78, 63 N. Y. St. 320; Mowry v. Bradley, 11 R. I. 370. Contra: Hale v. Plummer, 6 Ind. 121; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28. Compare Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503, holding there is inchoate right of dower in what real estate remains unconverted after partnership affairs are adjusted, and Chase v. Angell, 148 Mich. 1, 108 N. W. 1105, 118 Am. St. 568; Huber v. Case, 93 App. Div. 479, 87 N. Y. S. 663.

[73] Brewer v. Browne, 68 Ala. 210; Pugh's Heirs v. Currie, 5 Ala. 446; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Collins v. Warren, 29 Mo. 236; Bowman v. Bailey, 20 S. Car. 550.

can not convey his real estate to a partnership of which he is a member and cut off his wife's right to dower except by her consent.[74] Where the agreement between the partners has the effect of converting the land into out and out personalty there is no right to dower.[75] Therefore, in England, where by law partnership realty is converted into personalty for all purposes, there is no right of dower in it.[76] In a few American states the English rule has been adhered to.[77] The widow's right to a homestead is governed practically by the same rules applying to dower.[78] In some states, a partner as the head of a family, has a right to a homestead exemption in partnership real estate.[79] In others the rule is that a partner has no right to a homestead in partnership real estate, as against partnership debts[80] nor as against his co-partner.[81]

[74] Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; (In Indiana by deed in which she joins), Erissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

[75] Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Hale v. Plummer, 6 Ind. 21; Mallory v. Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776; Lowe v. Lowe, 13 Bush (Ky.) 688; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; McDermot v. Laurence, 7 Serg. & R. (Pa.) 438, 10 Am. Dec. 468.

[76] Houghton v. Houghton, 11 Sim. 491, 10 L. J. Ch. 310, 5 Jur. 528; Essex v. Essex, 20 Beav. 442; Conger v. Platt, 25 U. C. Q. B. 277; In re Music Hall Block, 8 Ont. 225.

[77] Pierce v. Trigg, 10 Leigh (Va.) 423; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325; Deering v. Kerfoot, 89 Va. 491, 16 S. E. 671.

[78] Ferguson v. Hanauer, 56 Ark. 179, 19 S. W. 749; Robertshaw v. Hanway, 52 Miss. 713.

[79] Blanchard v. Paschal, 68 Ga. 32, 45 Am. Rep. 474; Hunnicutt v. Summey, 63 Ga. 586; Ferguson v. Speith, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. 459; McMillan v. Parker, 109 N. Car. 252, 13 S. E. 764; Moyer v. Drummond, 32 S. Car. 165, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. 850; Swearingen v. Bassett, 65 Tex. 267; Allen v. Meyer (Tex. Civ. App.), 65 S. W. 645; Williams v. Meyer (Tex. Civ. App.), 64 S. W. 66; Gordon v. McCall, 20 Tex. Civ. App. 283, 48 S. W. 1111.

[80] Short v. McGruder, 22 Fed. 46; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Drake v. Moore, 66 Iowa 58, 23 N. W. 263; Regenstein v. Pearlstein, 32 S. Car. 437, 11 S. E. 298, 17 Am. St. 865; Brady v. Kreuger, 8 S. Dak. 464, 66 N. W. 1083, 59 Am. St. 771.

[81] Hoyt v. Hoyt, 69 Iowa 174, 28 N. W. 500; Drake v. Moore, 66 Iowa 58, 23 N. W. 263.

§ 297. **Right to exemptions in partnership property.**—Under most exemption statutes a partnership, as such, can not select and claim property as exempt from execution, for exemptions are usually allowed only to individual persons as heads of families.[82] In one case it was held that where an execution for a firm debt was levied on firm goods the partners could sever their interests and each claim exemption in his separate share.[83] In Tennessee the contrary was held.[84] Nor as a general rule can the partners as individuals claim exemption in the partnership property when levied on for firm debts.[85] The contrary is held in some states.[86] As a general rule, a partner can not during the continuance of the partnership claim an individual exemption in partnership property, as to individual debts.[87] It is held that a

[82] In re Lentz, 97 Fed. 486; White v. Heffner, 30 La. Ann. 1280, 31 Am. Rep. 238; Thurlow v. Warren, 82 Maine 164, 19 Atl. 158, 17 Am. St. 472; State ex rel. Fulks v. Pruitt, 65 Mo. App. 154; Bateman v. Edgerly, 69 N. H. 244, 45 Atl. 95, 76 Am. St. 162; Wise v. Frey, 7 Nebr. 134, 29 Am. Rep. 380; Russell v. Lennon, 39 Wis. 570, 20 Am. Rep. 60. Contra: Gilman v. Williams, 7 Wis. 329, 76 Am. Dec. 219; Fingerhuth v. Lachnann, 37 Ill. App. 489; Guptil v. McFee, 9 Kans. 30; Pond v. Kimball, 101 Mass. 105; State ex rel. Billingsley v. Spencer, 64 Mo. 355, 27 Am. Rep. 244; Gaylord v. Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762; Bonsall v. Comly, 44 Pa. St. 442; Spiro v. Paxton, 3 Lea (Tenn.) 75, 31 Am. Rep. 630.

[83] Russell v. Lennon, 39 Wis. 570, 20 Am. Rep. 60.

[84] Gill v. Lattimore, 77 Tenn. (9 Lea) 381.

[85] See cases cited in note 82, this section; Giovanni v. First Nat. Bank, 55 Ala. 305, 28 Am. Rep. 723; Richardson v. Adler, 46 Ark. 43; Cowan v. Creditors, 77 Cal. 403, 19 Pac. 755, 11 Am. St. 294; McCrimmon v. Linton, 4 Colo. App. 420, 36 Pac. 300; Love v. Blair, 72 Ind. 281; Sharp v. Baker, 51 Ind. App. 547, 99 N. E. 44, 96 N. E. 627; Till v. Rory, 3 Nebr. 261; Lynch v. Englehard-Winning-Davison Mercantile Co., 1 Nebr. (Unof.) 528, 96 N. W. 524; In re Spitz, 8 N. Mex. 622, 45 Pac. 1122, 34 L. R. A. 604; B. C. Evans Co. v. Kingsbury (Tex. Civ. App.), 25 S. W. 729.

[86] Bright v. Buhr's Admr., 11 Ky. L. 579; McCoy v. Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. 589.

[87] Schlapback v. Long, 90 Ala. 525, 8 So. 113; Porch v. Arkansas Milling Co., 65 Ark. 40, 45 S. W. 51, 67 Am. St. 895; State v. Bowden, 18 Fla. 17; Smith v. Harris, 76 Ind. 104; Green v. Taylor, 98 Ky. 330, 32 S. W. 945, 17 Ky. L. 897, 56 Am. St. 375; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156; State ex rel. Hinde v. United States Fidelity &c. Co., 135 Mo. App. 160, 115 S. W. 1081; Peaslee v. San-

partner can not claim exemption in partnership property, either as to his own or the firm's debt.[88] But it has been held in some states that a partner as to his individual creditors may claim exemptions out of partnership property.[89] Where, however, the joint interest of the partners in the property has been severed by sale by one partner of his interest to the other[90] or by dissolution,[91] one partner may claim exemption as to individual debts. But if execution was issued before dissolution and levy made afterward, there is no right to such exemption[92] and the right is cut off by assignment for benefit of creditors.[93] The taking charge by a receiver is not such a dissolution as to allow individual exemption.[94] It has been held, the other partners may, during the continuance of the relation, consent to one partner having a share of the partnership property set aside as his personal exemption.[95] In some states it is held that such consent is inef-

born, 68 N. H. 262, 44 Atl. 384; Southern Commission Co. v. Porter, 122 N. Car. 692, 30 S. E. 119.

[88] Hart v. Hiatt, 2 Ind. Ter. 245, 48 S. W. 1038.

[89] Southern Jellico Coal Co. v. Smith, 105 Ky. 769, 49 S. W. 807, 20 Ky. L. 1594. See also Howard v. Jones, 50 Ala. 67; Skinner v. Shannon, 44 Mich. 86, 6 N. W. 108, 38 Am. Rep. 232; Moyer v. Drummond, 32 S. Car. 165, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. 850; St. Louis Type Foundry v. International Live-Stock Journal Print. &c. Co., 74 Tex. 651, 12 S. W. 842, 15 Am. St. 870. See Farmers' Union Gin &c. Co. v. Seitz, 93 Ark. 329, 124 S. W. 780.

[90] Aiken v. Steiner, 98 Ala. 355, 13 So. 510, 39 Am. St. 58; Levy v. Williams, 79 Ala. 171; Goudy v. Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114 (even though the firm is insolvent at the time if no lien has attached); Lee v. Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456.

[91] In re Bjornstad, Fed. Cas. No. 1453, 9 Biss. (U. S.) 13; Dunklin v. Kimball, 50 Ala. 251; Worman v. Giddey, 30 Mich. 151; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156; State v. Thomas, 7 Mo. App. 205; Miller v. Waite, 59 Nebr. 319, 80 N. W. 907 (affd. 60 Nebr. 431, 83 N. W. 355); Dennis v. Kass, 11 Wash. 353, 39 Pac. 656, 48 Am. St. 880. See O'Gorman v. Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58; Bates v. Callender, 3 Dak. 256, 16 N. W. 506; Long v. Hoban, 7 Ohio Dec. 688, 4 Wkly. Law Bul. 986.

[92] State v. Day, 3 Ind. App. 155, 29 N. E. 436.

[93] Ex parte Hopkins, 104 Ind. 157, 2 N. E. 587.

[94] Weinrich v. Koelling, 21 Mo. App. 133.

[95] In re Seabolt, 113 Fed. 766; Richardson v. Redd, 118 N. Car. 677, 24 S. E. 422; Stout v. McNeill, 98 N. Car. 1, 3 S. E. 915; State v. Kenan, 94 N. Car. 296; Burns v. Harris, 67

fectual to allow an exemption.[96] The Uniform Partnership Act provides that nothing in it, "shall be held to deprive a partner of his right, if any, under the exemption law, as regards his interest in the partnership."[97]

§ 298. **Insurance of partnership property—Insurable interest.**—As any title or interest in property, legal or equitable, will generally support a contract of insurance, it follows that a partnership may insure property which it owns or in which it has an interest.[98] A partnership has an insurable interest in property partly held by deed and partly as mortgagees, half of it held under a voidable agreement.[99] It has an interest in grain held for sale on commission.[1] The partnership has no insurable interest in the household furniture or wearing apparel of a partner, and a policy in the partnership name embracing in part such property is void as to such property.[2] Partners engaged in purchasing land have an insurable interest in partnership property, to which they hold a deed.[3] A partner has an insurable interest in the entire property of the firm.[4] A partnership has an insurable interest in the life of one partner.[5] This interest ceases when the firm is dissolved before the partner's death.[6] Each

N. Car. 140; O'Gorman v. Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58.

[96] Wills v. Downs, 38 Ill. App. 269.

[97] Uniform Partnership Act, § 28 (3).

[98] Phœnix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, 7 L. ed. 335; Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; Scott v. Dixie Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152n.

[99] Columbian Ins. Co. v. Lawrence, 27 U. S. (2 Pet.) 25, 7 L. ed. 335.

[1] Phœnix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729.

[2] Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828.

[3] Grabbs v. Farmers' Mut. Fire Ins. Assn., 125 N. Car. 389, 34 S. E. 503.

[4] Millandon v. Atlantic Ins. Co., 8 La. 557; Converse v. Citizens' Mut. Ins. Co., 64 Mass. (10 Cush.) 37; Voisen v. Commercial Mut. Ins. Co., 62 Hun 4, 16 N. Y. S. 410; Manhattan Ins. Co. v. Webster, 59 Pa. St. 227, 98 Am. Dec. 332; Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

[5] Rahders v. People's Bank, 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912 A, 299 and note.

[6] Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. 107.

partner has an insurable interest in the lives of the other partners. The necessities of the business incur more or less liability which might be serious financially if one partner were removed by death.[7] The contrary has been held, where no capital was invested, no debt was due from one partner to the other and no other contribution owing from the partner was shown.[8] It has also been held that one partner may insure his life making the firm a beneficiary.[9]

§ 299. Insurance—Ownership clause in policy—Transfers by and between partners.—A surviving partner is not the sole owner of property belonging to the undivided partnership estate within the clause of the standard insurance policy which requires that if the interest of the insured is other than unconditional and sole ownership of the property, the fact must be disclosed to the insurer.[10] It has also been held that a partnership does not, within the meaning of this provision, own property contributed as a partner's share of the capital, but which has not been deeded to the partnership.[11] But, an assignment for the benefit of creditors by one member of a firm has been held not to affect the sole and undivided ownership by the firm of the partnership property.[12] Under the provision that an insurance policy is void if interest of the insured is not the unconditional and sole ownership, the fact that title to property insured in the firm name is in the name of the individual partners is not a breach of the

[7] Rahders v. People's Bank, 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912 A, 299. See also Connecticut Mut. L. Ins. Co. v. Luchs, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. 949, where there was debt owing the firm by the partner on whose life the insurance was taken, and Rush v. Hawkins, 135 Ga. 128, 68 S. E. 1035, where the partner on whose life the policy was paid contributed skill to the business. See Trinity College v. Travellers' Ins. Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291.

[8] Powell v. Dewey, 123 N. Car. 103, 31 S. E. 381, 68 Am. St. 818.

[9] Valton v. National Loan Fund &c. Soc., 22 Barb. (N. Y.) 9.

[10] Crescent Ins. Co. v. Camp, 64 Tex. 521.

[11] Citizens' Fire Ins. &c. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360.

[12] Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733.

condition.[13] Nor is the condition breached where property is insured in the name of a firm of which the policy holder had been a member, but which was dissolved before the policy was issued.[14] Nor by the insurance in the partnership name of a building deeded to the firm in its name by one of its members, in a jurisdiction where such a conveyance does not give the firm legal title.[15] According to the weight of authority and what seems to be the better reason, a condition making the policy void if there is any change in the title or interest of the insured without the consent of the company is not violated by the sale by one partner to another of his interest in the property, as this provision has no reference to a transfer of interest between partners.[16] But in Iowa and a few other states a different view has been taken.[17]

[13] Delaware Ins. Co. v. Bonnet, 20 Tex. Civ. App. 107, 48 S. W. 1104; Bonnet v. Merchants' Ins. Co. (Tex. Civ. App.), 42 S. W. 316; Scott v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152n.

[14] Merchants' Ins. Co. v. Bonnet (Tex. Civ. App.), 48 S. W. 1110.

[15] Missouri Sav. Assn. v. German-American Ins. Co., 73 Mo. App. 158.

[16] Burnett v. Eufaula &c. Ins. Co., 46 Ala. 11, 7 Am. Rep. 581; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; Drennen v. London Assur. Corp., 20 Fed. 657 (revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341); Powers v. Guardian Fire & Life Ins. Co., 136 Mass. 108, 49 Am. Rep. 20; New Orleans Ins. Assn. v. Holberg, 64 Miss. 51, 8 So. 175; Phenix Ins. Co. v. Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. 532; German Mut. Fire Ins. Co. v. Fox, 4 Nebr. (Unof.) 833, 96 N. W. 652, 63 L. R. A. 334; Combs v. Shrewsbury Mut. Fire Ins. Co., 34 N. J. Eq. 403; Wilson v. Genesee Mut. Ins. Co., 16 Barb. (N. Y.) 511 (revd. 14 N. Y. 418); Hoffman v. Ætna Fire Ins. Co., 19 Abb. Prac. (N. Y.) 325, 24 N. Y. Super. Ct. 501 (affd. 32 N. Y. 405, 88 Am. Dec. 337); Tallman v. Atlantic &c. Ins. Co., 29 How. Pr. (N. Y.) 71 (revd. 42 N. Y. 87, 4 Abb. Dec. (N. Y.) 345, 33 How. Pr. (N. Y.) 400); Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Dresser v. United Firemen's Ins. Co., 45 Hun 298, 12 N. Y. S. 434 (affg. 122 N. Y. 642, 25 N. E. 956); West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Texas Banking & Insurance Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754. Agreement of one partner to sell his interest to another: Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. 610. See also Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454.

[17] Oldham v. Anchor Mut. Fire Ins. Co., 90 Iowa 225, 57 N. W. 861; Jones v. Phœnix Ins. Co., 97 Iowa 275, 66

So, it was held that the retiring of one partner from participation in the business management or control of the partnership business, reserving to himself simply the right to see that the stock of goods is kept up to its value at the time of retiring as security for the payment of the amount allowed by the other partner for his interest, is such a change of possession, if not of title, as to avoid the policy on the goods, under a policy which provides that it shall be void if the title or possession of the property is changed.[18] It is generally held that a change in the firm by which a third party becomes a member of the firm is a violation of the condition and renders the policy void.[19] And the same has been held where the insured turns over property to a partnership of which he is a member.[20] In a New York case, where the policy contained a provision that it should be void "if the property be sold or transferred, or any change takes place in title or possession," the court said:[21] "The contract of insurance

N. W. 169. As supporting the rule that a transfer from one partner to another is within this provision, see Buckley v. Garrett, 47 Pa. St. 204; Finley v. Lycoming County Mut. Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705; Keeler v. Niagara Fire Ins. Co., 16 Wis. 523, 84 Am. Dec. 714. See also Hartford Fire Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452; Tillou v. Kingston Mut. Ins. Co., 5 N. Y. 405; Keith v. Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

[18] Jones v. Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169.

[19] Drennen v. London Assur. Corp., 20 Fed. 657 (revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341); Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. 398; American Steam Laundry Co. v. Hamburg-Bremen Fire Ins. Co., 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442n. See also Malley v. Atlantic Fire & Marine Ins. Co., 51 Conn. 222; Card v. Phœnix Ins. Co., 4 Mo. App. 424; Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454. But compare Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297.

[20] Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. 749; Biggs v. North Carolina Home Ins. Co., 88 N. Car. 141; Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. 247. But compare Cowan v. Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583; Blackwell v. Miami Valley Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 29 Am. St. 574, 14 L. R. A. 431.

[21] Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. 749. See cases cited in Beebe v. Ohio &c. Ins. Co., 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. 519. See also, as sustaining this doctrine, Drennen v. London Assur. Corp., 20

is peculiarly personal in its nature, and the success of the business of underwriting depends largely upon what is known as the moral hazard. * * * It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured. It would be a harsh and indefensible rule that required the underwriter, who had insured an individual on a stock of goods in a store, to continue the insurance after the insured had taken in two partners and formed a firm wherein each partner was vested with an undivided third interest in the property covered by the policy, without having been afforded the opportunity to examine into the moral and business characters of two strangers to the original contract. This right of the insurance company was in no wise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy. It is only when a stranger is to be brought into contractual relations with the insurance company that the consent of the latter is essential."

§ 300. Guaranty insurance—Identity of the insured—Partnership.—In guaranty insurance we find a principle somewhat analogous to that of change in interest or title in fire insurance. Two partners were insured against loss by uncollectible debts, under a policy which provided that "if any member guaranteed with respect to his gross or particular trade-debts shall cease to be such a trader, his guarantee or contract shall become void on his retiring from such trade," and it was held

Fed. 657 (revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341), and Malley v. Atlantic Fire & Marine Ins. Co., 51 Conn. 222; Card v. Phœnix Ins. Co., 4 Mo. App. 424. The mere dissolution of a firm does not destroy the joint interest of the copartners in the partnership property or make them tenants in common. The property continues as partnership property until it is disposed of. Until this is done there is no violation of the condition against a change in the title. But a dissolution of the partnership and a division of the partnership property prior to the fire is a violation of the condition. Roby v. American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808. See Dreher v. Ætna Ins. Co., 18 Mo. 128.

that the retirement of one partner invalidated the contract.[22] Under such a policy the death of a partner effects such a change in the firm as will release the insurer.[23]

§ 301. **Mortgage of partnership real estate.**—Where land is conveyed to partners as individuals which was purchased with partnership funds and is used for partnership purposes, the creditors of the copartnership are in such case entitled to priority of payment out of it in preference to the creditors of individual members of the firm.[24] But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as, for instance, for a loan of money, the mortgagee having notice of the character of the property in equity as copartnership property, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. A person taking a mortgage without notice that it covered partnership property is a purchaser, and is subject to no equity in favor of the partnership or of its creditors.[25] Whether real property is partnership assets depends upon the intention or agreement of the partners. Such intention may be express or implied. In the absence of an express agreement, parol evidence may be resorted to for the determination of the question. The manner in which the members of the firm have treated and used the property always goes far in determining its

[22] Solvency Mut. Guar. Co. v. Freeman, 7 Hurl. & N. 17.

[23] Cosgrave Brewing &c. Co. v. Starrs, 5 Ont. 189; Pemberton v. Oakes, 4 Russ. 154.

[24] Matlock v. Matlock, 5 Ind. 403; Hewitt v. Rankin, 41 Iowa 35; Messer v. Messer, 59 N. H. 375; Everett v. Schepmoes, 6 Hun (N. Y.) 479; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Tarbel v. Bradley, 7 Abb. (N. Cas.) (N. Y.) 273; Hogle v. Lowe, 12 Nev. 286; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Pollock's Dig. of Law of Partnership, ch. 6; Story Partnership, §§ 92, 93.

[25] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Reeves v. Ayers, 38 Ill. 418; Hewitt v. Rankin, 41 Iowa 35; Seeley v. Mitchell, 85 Ky. 508, 4 S. W. 190, 9 Ky. L. 86; Hiscock v. Phelps, 49 N. Y. 97; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014.

character.[26] If the property has been purchased by the individual partners with their own funds, each taking a conveyance of an undivided interest, the fact that the property has for a time been used for the partnership business is not generally sufficient to impress it with an equitable lien for the payment of partnership debts as against a mortgage of one partner's interest to secure his individual debt.[27] A valid mortgage of partnership property to secure a partnership debt, may be made by one partner[28] with the express or implied assent of the other partner.[29] Under some

[26] See § 282 ante, on intention. Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Deming v. Moss, 40 Utah 501, 121 Pac. 971; Bosworth v. Hopkins, 85 Wis. 50, 55 N. W. 424; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336. See also Richtman v. Watson, 150 Wis. 385, 136 N. W. 797.

[27] Wilhite v. Boulware, 88 Ky. 169, 10 S. W. 629, 11 Ky. L. 59.

[28] Long v. Slade, 121 Ala. 267, 26 So. 31; Breen v. Richardson, 6 Colo. 605 (given to prevent sacrifice of partnership realty); Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Horton v. Bloedorn, 37 Nebr. 666, 56 N. W. 321 (in absence of copartner, firm being insolvent); Weeks v. Mascoma Rake Co., 58 N. H. 101; Neer v. Oakley, 18 N. Y. St. 374, 2 N. Y. S. 482 (without consulting copartner); Baldwin v. Richardson, 33 Tex. 16; Schwab Clothing Co. v. Claunch (Tex. Civ. App.), 29 S. W. 922 (with consent of copartner). Under Georgia Civ. Code 1910, § 3172, each partner has power to contract or otherwise bind the firm and execute any writing in the course of the business.

[29] McGahan v. Bank of Rondout, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347; Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966 (in presence of copartner with consent); Cottle v. Harrold, 72 Ga. 830; Printup v. Turner, 65 Ga. 71; Sutlive v. Jones, 61 Ga. 676; Ely v. Hair, 55 Ky. 230 (with knowledge and assent of copartner); Ely v. Hair, 16 B. Mon. (Ky.) 230; Kahn v. Becnel, 108 La. 296, 32 So. 444 (power to mortgage not implied from power to secure advances); Baker v. Lee, 49 La. Ann. 874, 21 So. 588; Chittenden v. German Amer. Bank, 27 Minn. 143, 6 N. W. 773; Jones v. Davis (N. J. Eq.), 25 Atl. 370; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. S. 753; Tarbell v. Bradley, 7 Abb. N. Cas. (N. Y.) 273 (affd. Tarbell v. West, 86 N. Y. 280); Lance v. Butler, 135 N. Car. 419, 47 S. E. 488; McNeal Pipe &c. Co. v. Woltman, 114 N. Car. 178, 19 S. E. 109; Napier v. Catron, 2 Humph. (Tenn.) 534; Caviness v. Black (Tex. Civ. App.), 33 S. W. 712; Schwab Clothing Co. v. Claunch (Tex. Civ. App.), 29 S. W. 922; Byrd v. Perry, 7 Tex. Civ. App. 378, 26 S. W. 749 (mortgage by one partner procured by other); Weir Plow Co. v. Evans (Tex. Civ. App.), 24 S. W. 38; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795. But see Beckman v. Noble, 115 Mich. 523, 73 N. W. 803; Cohen v. Miller, 46 Misc. 106, 91 N. Y. S. 345.

authorities such a mortgage, made without authority of the other partner, is held to bind only the interest of the partner executing it.[29a] Where a copartnership carried on business in a store built by the firm upon land, the legal title of which was in A, and one of his copartners, to secure a copartnership debt, executed a mortgage of the land with the consent of his copartners, and in the firm name of A & Co., and acknowledged the execution of it "as his free act and deed in behalf of said firm," it was held valid as against a person who, with actual notice of this, took a subsequent mortgage of the same property executed by A.[30] Such a mortgage is valid, too, as against creditors of the firm whose lien attached afterward.[31] An exception to the general rule, that an authority to bind another by an instrument under seal must itself be created by a like instrument, seems to have been established in the case of partners; they may give each other authority by parol to bind each other by instruments under seal.[32] Some of the cases cited do not refer to conveyances of real estate. But if authority to execute a personal contract under seal may be implied from this relation, the same authority may as well extend to conveyances of real property. Lord Kenyon said that, if the relation of partnership gave this authority in the one case, it "would extend to the case of mortgages."[33] An unauthorized mortgage of partnership property made by one partner using the name of his copartner may be ratified by the latter by parol, or by any act showing his recognition of the mortgage. A mortgage of such real estate by one partner to secure a copartnership debt is valid;[34]

[29a] Cottle v. Harrold, 72 Ga. 830; Printup v. Turner, 65 Ga. 71; Sutlive v. Jones, 61 Ga. 676; Baker v. Lee, 49 La. Ann. 874, 21 So. 588; Weeks v. Mascoma Rake Co., 58 N. H. 101.

[30] Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[31] Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551.

[32] Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Metc. (Mass.) 548; Smith v. Kerr, 3 N. Y. 144. See also Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[33] Harrison v. Jackson, 7 Term Rep. 203, 4 R. R. 422.

[34] Cooley v. Hobart, 8 Iowa 358; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242. But see Baker v. Lee, 49 La. Ann. 874, 21 So. 588 (ratification by parol insufficient).

but it is not valid if made in opposition to the will of another partner with the knowledge of the creditor.[35]

§ 302. Mortgage by one partner—Notice of partnership equities.—A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts. The mortgage is not available until the partnership debts have been paid and the partnership accounts discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority;[36] or if the creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.[37] There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.[38] Upon the bankruptcy of the firm, the assignee, in behalf of the creditors, would be entitled to the property in preference. If one partner, upon retiring from the partnership, conveys his interest in the partnership real estate to another person, who then comes in and forms a new firm, and this new partner executes a mortgage of such real estate to secure the purchase-money, in the absence of any evidence that the mortgage was intended to be a mortgage of this partner's interest in the new firm, it is proper to regard it as a mortgage of the same partnership interest in the old firm which was conveyed to the new partner, and not of his interest in the new firm. Such a mortgage is subject to the payment of the debts of the old firm, but not to the payment of the debts of the

[35] H. Y. McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Fidelity Banking &c. Co. v. Kangara Val. &c. Co., 95 Ga. 172, 22 S. E. 50; Bull v. Harris, 18 B. Mon. (Ky.) 195.

[36] Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Beecher v. Stevens, 43 Conn. 587; Seeley v. Mitchell, 85 Ky. 508, 4 S. W. 190, 9 Ky. L. 86; Rockefellar v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788.

[37] Fargo v. Ames, 45 Iowa 491; Seaman v. Huffaker, 21 Kans. 254; Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458.

[38] Lovejoy v. Bowers, 11 N. H. 404.

new firm.[39] But the mortgagee must be in the position of a bona fide purchaser for value; he must have parted with money or goods, or something valuable, in reliance upon the security. If he simply take the mortgage to secure an existing debt, or has knowledge of the facts which make the property in equity assets of the firm, then his mortgage will be postponed to the equities of those who have a right to have the property applied as assets of the copartnership.[40] But a recital in a deed to three persons that the conveyance was in the proportion of an undivided half to one of them, and an undivided fourth to each of the others, "this being the proportional undivided interest of each of the above partners in the firm and lands" of the partnership, was held not necessarily to impart notice to a mortgagee of the interest of one of the grantees of the equitable rights of others as representing the creditors of the firm.[41] A mortgage by one partner of his interest in a mill and machinery in the continued use and occupation of the partnership, to secure such partner's individual debt, passes only what interest such partner may have after paying the debts of the partnership.[42] The continued use of such property by the partnership is notice of the equitable rights of the partnership in the property. If the description of the property in the mortgage itself shows that the property is that of a partnership, as where it is described as all the right, title and interest of a partner individually, and as a member of a certain firm in all the real estate and other property of the firm, the mortgagee necessarily has notice of the partnership equities. The existence of such a mortgage can not prevent the copartners from disposing of the real estate for the legitimate purposes of the copartnership, such as adjusting its affairs with creditors, or with each other. The recording of such mortgage is without effect upon the other

[39] Beecher v. Stevens, 43 Conn. 587. See also Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378.

[40] Hiscock v. Phelps, 49 N. Y. 97.

[41] Van Slyck v. Skinner, 41 Mich. 186, 1 N. W. 971. But the decision in this case seems not to be quite in harmony with other authorities.

[42] Mechanics' Bank v. Godwin, 5 N. J. Eq. 334.

members of the copartnership, or upon any one taking a conveyance made for partnership purposes.[43]

§ 303. **Mortgage of partner's separate property to secure firm debt.**—If a partner mortgages his separate property to secure a partnership debt, he becomes a surety for the firm, and his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.[44] One partner has no right to mortgage the corporate property for the payment of his individual debt without the assent, express or implied, of the other partners, and it makes no difference in the application of this principle that the separate creditor had no knowledge at the time of the fact of the property being partnership property.[45] Justice Story of the United States Supreme Court says: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purposes, is an excess of his authority as partner; and a misappropriation of those funds, for which the partner is responsible to the partnership; though in the case of bona fide purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, in regard to partnership property or contracts beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle; and in our judgment, it is founded in good sense and reason. One man ought not to be permitted to

[43] Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273 (affd. 86 N. Y. 280). See note to this case for decisions relating to partnership realty.

[44] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[45] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; H. Y. McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Rainey v. Nance, 54 Ill. 29; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Lance v. Butler, 135 N. Car. 419, 47 S. E. 488.

dispose of the property or to bind the rights of another unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds than the partner himself had."[46] Such a mortgage may, however, be given with the assent of copartners.[47] The mortgage will also be valid in cases where the property covered is set off to the mortgagor on a division of the assets of the firm.[48] Upon the death of a partner holding such an interest in partnership real estate, his share descends to his heirs, but equity converts the legal title into a trust, to be devoted to the payment of partnership obligations, before it can be taken as a part of his separate estate.[49] As against the partnership creditors there can be no dower in such land. But when such real estate is not required for the payment of the partnership debts or the adjustment of accounts between the partners, it is to be treated as realty in the settlement of the estate, and is subject to dower. It is then treated in every way as real estate, and does not go to the personal representatives of the deceased. It is to be regarded as real estate, and subject to all the rules applicable to real estate.[50] The conversion of such real estate into personalty for the purpose of the settlement of partnership affairs, is a device of equity; and as soon as the reason of the rule ceases, by the closing of the partnership affairs without calling upon the real estate, the rule itself no longer applies.[51] This equitable interference is not extended so as to convert all real estate into personalty for the

[46] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063.

[47] Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899.

[48] Smith v. Andrews, 49 Ill. 28.

[49] Piatt v. Oliver, 3 McLean (U. S.) 27, Fed. Cas. No. 11116 (affd. 3 How. 333, 11 L. ed. 622); Wilcox v. Wilcox, 13 Allen (Mass.) 252; Howard v. Priest, 5 Met. (Mass.) 582; Dyer v. Clark, 5 Met. (Mass.) 562, 39 Am. Dec. 697; Burnside v. Merrick, 4 Met. (Mass.) 537.

[50] See §§ 288-290 ante; Hewit v. Rankin, 41 Iowa 35, and cases cited; Wilcox v. Wilcox, 13 Allen (Mass.) 252; In re Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

[51] Judge Story says, in his work on

purpose of a division. A mortgage by an individual partner of such real estate is relieved of all equities in favor of the partnership so soon as the business of the partnership is closed, without requiring the application of it to the firm debts.[52]

§ 304. Mortgage of partnership personal property.—A mortgage by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. The giving of such a mortgage is itself a waiver.[53] The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts. The mere preference of individual debts by mortgage to secure them over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside.[54] The partnership creditors have no lien on the property of the partnership if the partners themselves have none.[55] But such a preference of individual creditors when the partnership is insolvent, and this fact is known to the mortgagee, may render the mortgage void as against the partnership creditors.[56] One member of a copartnership may mortgage his interest in the firm to secure his own individual debt. Such a mortgage is, of course, subject to the prior equities of the partnership creditors. If after such a mortgage the partnership business be closed, and a receiver of it appointed, in whose hands, after settling the affairs of the firm, there remains

partnership, § 93, that this is an open question. But the authorities now seem decisive of the law as stated in the text.

[52] Hewitt v. Rankin, 41 Iowa 35.

[53] In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. 7593; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[54] Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; National Bank v. Sprague, 20 N. J. Eq. 13; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494.

[55] Jones Liens (2d ed.), § 788; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[56] Cribb v. Morse, 77 Wis. 322, 46 N. W. 126.

a surplus to the credit of the members of the firm, such surplus will belong to the mortgagee in preference to the assignee in bankruptcy of the mortgagor.[57] A mortgage by one partner of specific partnership property, to secure his individual debt, confers no title or lien upon that property as against the partnership or its creditors, but only a right to the mortgagor's interest therein after the partnership debts are paid,[58] and the firm has been dissolved.[59] A mortgage of partnership property, executed by one partner to secure his individual debt, may, however, be ratified and confirmed by his copartner, so as to be an effectual mortgage by the partnership.[60] One partner may execute a valid mortgage of partnership goods to secure a partnership debt by signing the firm name, or the individual names of the members of the firm.[61] One copartner having authority to pass a valid title to such property by bill of sale may, as incident thereto, execute a transfer of it in any form or mode by which such title could in any case be legally transferred. It is immaterial whether he sign the name of each copartner separately, or sign the firm

[57] Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Monroe v. Hamilton, 60 Ala. 226; Smith v. Andrews, 49 Ill. 28; Thompson v. Spittle, 102 Mass. 207. Under the English Bills of Sale Act of 1854, a mortgage by a partnership was regarded as an assignment of a chose in action, and not within the act. In re Bainbridge, L. R. 8 Ch. Div. 218, 47 L. J. Bk. 70, 38 L. T. 229, 26 W. R. 439.

[58] Nichol v. Stewart, 36 Ark. 612; Millhiser v. Pleasants, 118 N. Car. 237, 23 S. E. 969; Moline Wagon Co. v. Rummell, 2 McCrary (U. S.) 307, 12 Fed. 658.

[59] Fort Worth Nat. Bank v. Daugherty, 81 Tex. 301, 16 S. W. 1028.

[60] McCoy v. Boley, 21 Fla. 803; Nelson v. Wheelock, 46 Ill. 25; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494.

[61] Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013; Bohler v. Tappan, 1 McCrary (U. S.) 134, 1 Fed. 469; Gates v. Bennett, 33 Ark. 475; Letts-Fletcher Co. v. McMaster, 83 Iowa 449, 49 N. W. 1035; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Patch v. Wheatland, 8 Allen (Mass.) 102; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242; Walker v. White, 60 Mich. 427, 27 N. W. 554; Rogers v. Gage, 59 Mo. App. 107; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Neer v. Oakley, 18 N. Y. St. 374, 2 N. Y. S. 482; Graser v. Stellwagen, 25 N. Y. 315; Mabbett v. White, 12 N. Y. 442; Odom v. Clark, 146 N. Car. 544, 60 S. E. 513; Hembree v. Blackburn, 16 Ore. 153, 19 Pac. 73; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St.

name.[62] The addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary.[63]

§ 305. **Conveyance of partnership real estate—Uniform Partnership Act.**—The Uniform Partnership Act makes some very radical changes in the generally accepted rules as to the conveyance of partnership real estate. It first provides that any estate in real property may be acquired in the partnership name, and that title so acquired can be conveyed only in the partnership name.[64] It further provides as to conveyance of real property the term conveyance in deeding every assignment, lease, encumbrance or mortgage,[64a] Sec. 10. (1) Where the title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9 [relative to the agency of a partner for the purpose of firm business], or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority. (2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act

422. In Wyoming it is necessary for each and every member of a copartnership to execute and acknowledge a mortgage, bond, conveyance, or other instrument intended to operate as a chattel mortgage, for and on behalf of a partnership. Wyo. Laws (1891), ch. 7, § 2.

[62] Cooley v. Hobart, 8 Iowa 358; Bernstein v. Hobelman, 70 Md. 29, 16 Atl. 374; Graser v. Stellwagen, 25 N. Y. 315; Mabbett v. White, 12 N. Y. 442; Johnson v. Nelson, 2 Ohio Dec. 487, 3 West. L. Month. 306; Paterson v. Maughan, 39 U. C. Q. B. 371; Halpenny v. Pennock, 33 U. C. Q. B. 229.

[63] Hawkins v. Hastings Bank, 1 Dill. (U. S.) 462, Fed. Cas. No. 6244, 2 Nat. Bank. Reg. 337; Milton v. Mosher, 7 Met. (Mass.) 244; Tapley v. Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374; Lamb v. Durant, 12 Mass. 54, 7 Am. Dec. 31; Sweetzer v. Mead, 5 Mich. 107; Weeks v. Mascoma Rake Co., 58 N. H. 101; Purviance v. Sutherland, 2 Ohio St. 478; Woodruff v. King, 47 Wis. 261, 2 N. W. 452.

[64] Uniform Partnership Act, § 8 (3).

[64a] Uniform Partnership Act, § 2.

is one within the authority of the partner under the provisions of paragraph (1) of section 9. (3) Where the title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partner in whose name the title stands may convey title to such property, but the partnership may recover such property if the partner's act does not bind the partnership under the provisions of paragraph (1) of section 9 [relative to the agency of a partner for the purpose of firm business], unless the purchaser, or his assignee, is a holder for value without knowledge. (4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9. (5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

§ 306. Taxation of partnership property.—As a general rule, partnership property is properly taxed to the firm, in its firm name, the firm in most states being regarded as an entity for the purposes of taxation, or being so made by the tax assessment laws,[65] even after one partner's death, while the other partner is winding up the business.[66] But firm property in the exclusive possession of a partner may be assessed to him[67] and under some statutes though properly assessed in the firm name, the tax is not invalid if the firm property is assessed in one partner's name.[68]

[65] See cases cited in note 51, §§ 120, 121, on entity. Stockwell v. Brewer, 59 Maine 286; Commonwealth v. Schmelz, 114 Va. 364, 76 S. E. 905. See Forst v. Parker, 34 N. J. L. (5 Vroom) 71; Swallow v. Thomas, 15 Kans. 66; Thibodaux v. Keller, 29 La. Ann. 508; Oliver v. Lynn, 130 Mass. 143; Hubbard v. Winsor, 15 Mich. 146; People v. Wells, 177 N. Y. 586, 70 N. E. 1106; Robinson v. Ward, 13 Ohio St. 293.

[66] Blodgett v. Muskegon, 60 Mich. 580, 27 N. W. 686.

[67] Welles v. Battelle, 11 Mass. 477.

[68] Fletcher v. Post, 104 Mich. 424, 62 N. W. 574.

Under the Indiana statute each partner is liable for the whole tax and one partner may be compelled by the state to pay back-taxes on unlisted property.[69] A retiring partner is not liable for taxes assessed after the date of his retirement.[70] The firm, after dissolution, is not liable for future taxes[71] and its former partners are liable for taxes already assessed and due.[72] As a general rule, the property of a partnership is taxed at the place where it carries on its business,[73] notwithstanding the fact that the partners are not residents of such place,[74] or the property is located

[69] Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109.

[70] Washburn v. Walworth, 133 Mass. 499.

[71] Rivers v. New Orleans, 42 La. Ann. 1196, 8 So. 484; Von Phul v. New Orleans, 24 La. Ann. 261. See also People v. Coleman, 44 Hun (N. Y.) 20.

[72] Rivers v. New Orleans, 42 La. Ann. 1196, 8 So. 484.

[73] 1 Cooley Taxation (3 ed.), 659; 1 Desty Taxation, p. 289. See note Ann. Cas. 1912 B, p. 758 et seq.; Jackson v. Union, 82 Conn. 266, 73 Atl. 773; Conn. Gen. Stat., § 2342; Ill. Rev. Stat. (1893), ch. 120, § 13; Selz v. Cogwin, 104 Ill. 647; McCann v. Minot, 107 Maine 393, 78 Atl. 465; Rev. Stat. Maine, ch. 9, § 22; Hopkins v. Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477; Mass. Pub. Stat., ch. 11, § 24; Mass. Rev. Laws, ch. 12, § 27, Stat. 1909, ch. 490, p. 1, § 27; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Ricker v. American Loan &c. Co., 140 Mass. 346, 5 N. E. 284; Mich. Tax Laws 1882, §§ 5, 10, 11; Osterhout v. Jones, 54 Mich. 228, 19 N. W. 964; Monroe v. Greenhoe, 54 Mich. 9, 19 N. W. 569; State v. Dunn, 86 Minn. 301, 90 N. W. 772; N. Y. Laws 1896, ch. 908, § 7; People v. Wells, 85 App. Div. 440, 82 N. Y. S. 866, 83 N. Y. S. 387; School Dist. v. Kittredge, 27 Vt. 650; Wis. Rev. Stat., § 1040; Sanford v. Spencer, 62 Wis. 230, 22 N. W. 465; Torrey v. Shawano County, 79 Wis. 152, 48 N. W. 246; Can. Stat. U. C. C. 55; In re Hatt, 7 U. C. L. J. 103; School Dist. v. Bowman, 178 Mo. 654, 77 S. W. 880; McCoy v. Anderson, 47 Mich. 502, 11 N. W. 290; Fairbanks v. Kittredge, 24 Vt. 9; Bemis v. Boston, 14 Allen (Mass.) 366; Peabody v. Essex County, 10 Gray (Mass.) 97; Louisville v. Tatum, 111 Ky. 747, 64 S. W. 836, 23 Ky. L. 1014; State v. Hynes, 82 Minn. 34, 84 N. W. 636. In Massachusetts the property has generally been held taxable at the principal place of business; Cloutman v. Concord, 163 Mass. 444, 40 N. E. 763; Barker v. Watertown, 137 Mass. 227; Farwell v. Hathaway, 151 Mass. 242, 23 N. E. 849. Under Ind. Rev. Stat. 1881, § 6293, held a vessel owned by partners is taxed where one partner resides in the state and nowhere else. Cook v. Port Fulton, 106 Ind. 170, 6 N. E. 321. Compare Eversole v. Cook, 92 Ind. 222. Under Gen. Stat. Kans., § 1023; Griffith v. Carter, 8 Kans. 565, partnership property was taxable to the owner at his residence.

[74] Duxbury v. Plymouth County,

in another state.[75] Thus it was held in Nebraska that the credits of a partnership engaged in a live stock commission and money loaning business which maintains one office in Nebraska shall be taxed in the county, township precinct, city and school district where the office is located, though the credits are payable in another state, the principal place of business is in Chicago and the partners are nonresidents.[76] In New Jersey the interest of each resident partner is taxed at his residence, and nonresident partners are taxed where the property is situated.[77]

§ 307. Transfer of property from partnership to partner. —Generally speaking, the members of a partnership have the same rights as other owners of property to transfer the title thereto. Where a partnership is held not to be an entity, a transfer of title to firm property must, of course, be made by all the partners or by one partner authorized to act for all. The authority of one partner to act for all will not be implied as to transfers of property not within the scope of the firm business, and not for firm purposes.[78] The authority of one partner to sell firm property will be discussed later.[79] The conveyance of land by partnerships has been treated.[80] The limitation on the right of a partnership to transfer property is the limitation on the right of persons owning property and competent to contract, namely, that it shall not be done so as to defraud creditors.[81]

172 Mass. 383, 52 N. E. 535; Clay v. Douglas County, 88 Nebr. 363, 129 N. W. 548, Ann. Cas. 1912 A, 756 and note; Tide-Water Pipe Co. v. State Board, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684; In re McMahon, 66 How. Pr. (N. Y.) 190.

[75] St. John v. Mobile, 21 Ala. 224; Spinney v. Lynn, 172 Mass. 464, 53 N. E. 523.

[76] Clay v. Douglas County, 88 Nebr. 363, 129 N. W. 548, Ann. Cas. 1912 B, 756.

[77] Taylor v. Love, 43 N. J. L. 142.

[78] See §§ 413, 444 infra.

[79] See § 444 infra.

[80] See §§ 269, 305 ante.

[81] Blake v. Sargent (D. C.), 152 Fed. 263; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712. See § 431 infra. Jones v. Lusk, 2 Metc. (Ky.) 356. The creditors of a partnership have a certain claim against its assets which, "resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is, ordinarily, but a right by lawful procedure to acquire a lien during the ownership of the debtor;

This section is concerned especially with the transfer of partnership property to a partner, or the conversion of firm property into separate property. If there is nothing about the transaction which will hinder, delay or defraud firm creditors, partnership property may be transferred upon consideration to one or more of the members of the firm and become the separate property of such member or members.[82] This transfer must be by the joint act of all partners.[83]

If there is a consideration, the transfer is usually held valid, even though the firm is insolvent, where there is no proof of bad faith, and an assumption of the firm debts by the partner to

yet under certain circumstances that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of fraud and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers, for good consideration, without notice. Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual, and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent extinguishment of the rights of its partners inter sese, yet, if the alienation be effected with intent to hinder, delay or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects." Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712, quoted in Gilmore Partnership, p. 178.

[82] Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899; Warner v. Grafton Woodworking Co., 210 Fed. 12, 126 C. C. A. 592; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040n; West v. Chasten, 12 Fla. 315; Upson v. Arnold, 19 Ga. 190, 63 Am. Dec. 302; Frederick v. Cooper, 3 Iowa 171; Jones v. Lusk, 2 Metc. (Ky.) 356; Richards v. Manson, 101 Mass. 482; Meadowcraft v. Walsh, 15 Mont. 544, 39 Pac. 914; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; Crosby v. Nichols, 3 Bosw. (N. Y.) 450; McKinney v. Baker, 9 Ore. 74; Beckwith v. Manton, 12 R. I. 442; Hickerson v. McFaddin, 1 Swan (Tenn.) 258; Allen v. Thrall, 10 Vt. 255; Fisher v. Vaughan, 75 Wis. 609, 44 N. W. 831, 833; Hobbs Hardware Co. v. Kitchen, 17 Ont. 363; Bolton v. Puller, 1 B. & P. 539, 4 Rev. Rep. 723; Ex parte Walker, 4 De G., F. & J. 509, 45 Eng. Reprint 1281; Ex parte Ruffin, 6 Ves. 119.

[83] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. 150; Upson v. Arnold, 19 Ga. 190, 63 Am. Dec. 302;

whom the property is conveyed is a sufficient consideration.[84] A voluntary transfer without consideration is invalid in case of insolvency.[85] Some courts hold the transfer voluntary, where the only consideration is the promise to pay firm debts.[86] A written or formal contract is not essential to the transfer,[87] but a mere executory agreement accomplishes no transfer.[88] Nor does the use of firm property by one partner to pay individual debts without the consent of the copartners.[89] Where one partner in consideration of the sale of a horse to him, agreed to pay the claims of a third person against the firm for keeping a horse, the interest of the partners in the horse was severed.[90] And where one partner, on retiring from the firm, sold to his copartner his right in

Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Ex parte Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237.

[84] Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Myers v. Tyson, 2 Kans. App. 464, 43 Pac. 91; Richards v. Manson, 101 Mass. 482; Werner v. Iler, 54 Nebr. 576, 74 N. W. 833; Dimon v. Hazard, 32 N. Y. 65; Sigler v. Knox County Bank, 8 Ohio St. 511; Gallagher's Appeal, 114 Pa. 353, 7 Atl. 237, 60 Am. Rep. 350; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[85] Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. 596; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066 (affd. 54 N. J. Eq. 701, 37 Atl. 1117); In re Kemptner, L. R. 8 Eq. 286, 21 L. T. 223, 17 W. R. 818.

[86] Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. 596; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066 (affd. 54 N. J. Eq. 701, 37 Atl. 1117); Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Darby v. Gilligan, 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740; Ex parte Mayou, 4 De G., J. & S. 664.

[87] In re Great Western Tel. Co., Fed. Cas. No. 5740, 5 Biss. (U. S.) 363; West v. Chasten, 12 Fla. 315; Frederick v. Cooper, 3 Iowa 171; Pilling v. Pilling, 3 De G., J. & S. 162, 46 Eng. Reprint 599.

[88] Fitzgerald v. Christi, 20 N. J. Eq. 90; Koningsburg v. Launitz, 1 E. D. Smith (N. Y.) 215; Ex parte Wheeler, Buck 25.

[89] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Brickett v. Downs, 163 Mass. 70, 39 N. E. 776.

[90] Simpson v. Ritchie, 86 Atl. 124, 110 Maine 299.

the use of the firm name, and afterward the retiring partner re-entered the firm, under an agreement which said nothing about the firm name, it was held that name remained the right of the copartner.[91]

[91] Marcus v. McFarland, 119 Md. 269, 86 Atl. 337.

CHAPTER XII

GOOD WILL

SECTION

315. In general—Defined.
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§ 315. **In general—Defined.**—The good will of a partnership may be said in a general way to be the value of its business, over and above the value of its tangible assets, and which grows out of the firm name, trade worked up and publicity obtained. It is as much an asset of the firm, to the amount of its actual value to the business, as is its physical property, and, consequently, is the subject of sale and other contract, or of a right of action for a tort concerning it, as is any other property of the firm. Like any other form of good will, the good will of a partnership depends very largely upon the continuance of the business, and a cessation of the business for any extended time will generally, in whole or in part, destroy the value of the good will. Good will has been variously defined. Some of the definitions are narrow; others are broad. The narrowest definition is that

of Lord Eldon perhaps which defines good will as, "nothing more than the probability that the old customers will resort to the old place."[1] It has been broadly defined as, "All that good disposition which customers entertain toward the house of business, identified by the particular name or firm and which may induce them to continue giving their custom to it." And further it, "must mean every advantage * * * that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."[2] Lord Eldon's definition is not exactly correct in that it limits good will to a place. The firm might move their place of business to a new location, without losing the good will, as customers might follow the firm, owing to friendship, trade relations or otherwise. It might perhaps be stated better by saying that the good will is the probability that old customers will continue to do business with the firm and that on account of the worked-up business and pleased customers, new customers will be attracted to the firm. Good will, being an asset of the firm, is subject to a partial ownership of every member thereof and is ascertained in the same manner as any other asset, by a settlement of the partnership. As stated in one case:[3] "This rule applies to the interest of a partner in the profits or good will of the partnership business as well as to the tangible assets of the firm." Leaseholds on the property where a partnership business is conducted have been held to be part of the good will.[4] The good will includes the general credit and reputation of the firm and is not the same thing as its trade-marks; so a con-

[1] Cruttwell v. Lye, 17 Ves. Jr. 335, 11 Rev. Rep. 98. See also Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. 736.

[2] Churton v. Douglas, John. 174, 19 Eng. Rul. Cas. 666; Von Breman v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293. For a review of the various definitions of good will see People v. Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126.

[3] Sindelare v. Walker, 137 Ill. 43, 27 N. E. 59, 31 Am. St. 353.

[4] Kaufmann v. Kaufmann, 239 Pa. 42, 86 Atl. 634.

tinuing partner was required to account for the good will, in addition to the trade-marks, where the trade-marks had been valued and carried on the books as part of the firm assets.[5] Partners may provide in the partnership agreement for the disposal of the good will or firm name on dissolution, even so far as to deprive one partner of any rights therein at that time[6] or place a valuation on it to be paid by a surviving or continuing partner.[7]

§ 316. Sale of good will in absence of restrictive covenant. —The law recognizes in good will a thing of value which may be sold, regardless, however, of whatever definition of good will may be adopted. It is held, as a general rule, that in the case of a transfer thereof the assignor, in the absence of any express agreement to the contrary, may carry on a similar business in the same locality. A mere sale of good will, in the absence of any express restrictive covenant, does not import an agreement by the vendor not again to engage in a competing business.[8] But while

[5] Brooklyn Trust Co. v. McCutchen, 189 Fed. 273.

[6] Withers v. Mills, 153 N. Y. S. 1016.

[7] Kaufmann v. Kaufmann, 86 Atl. 634, 239 Pa. 42.

[8] Cottrell v. Babcock &c. Mfg. Co., 54 Conn. 122, 6 Atl. 791; Porter v. Gorman, 65 Ga. 11; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380; Findlay v. Carson, 97 Iowa 537, 66 N. W. 759; Drake v. Dodsworth, 4 Kans. 159; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Bassett v. Percival, 5 Allen (Mass.) 345; Reber v. Pearson, 155 Mich. 593, 119 N. W. 897; Counts v. Medley, 163 Mo. App. 546, 146 S. W. 465; Wessell v. Havens, 91 Nebr. 426, 136 N. W. 70, Ann. Cas. 1913 C, 1377; Smith v. Gibbs, 44 N. H. 335; Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 185, 83 Atl. 907; Von Breman v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293; Close v. Flesher, 8 Misc. 299, 59 N. Y. St. 283, 28 N. Y. S. 737; White v. Jones, 1 Robt. (N. Y.) 321; Snowden v. Noah, Hopk. Ch. (N. Y.) 347, 14 Am. Dec. 547; Moody v. Thomas, 1 Disney (Ohio) 294, 12 Ohio Dec. 630; Rupp v. Over, 3 Brewst. (Pa.) 133; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; In re Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584; Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; Moreau v. Edwards, 2 Tenn. Ch. 347; Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. 72; Churton v. Douglas, Johns. 174;

there is no implied covenant not to engage in a competing business in the absence of a restrictive covenant to that effect, some courts do, nevertheless, afford the vendee a measure of protection and hold that by a voluntary sale of such good will the vendor precludes himself from setting up a competing business which will derogate from the good will which he has sold.[9]

§ 317. Retiring partner soliciting old customers—English rule.—In 1896, Lord Macnaghton, in the English case of Trego v. Hunt,[10] very clearly stated the law where a person has sold the good will of his business or who has been taken into partnership upon the terms that the good will shall belong solely to his partner, as to whether or not he is at liberty after the sale or the expiration of the partnership to solicit the old customers of the business. The question had been decided in the negative in 1872 by Lord Romilly, in the case of Labouchere v. Dawson,[11] while in 1884 the Court of Appeals decided the question in the affirmative in Pearson v. Pearson.[12]

The case of Labouchere v. Dawson was overruled by a divided court, Lord Justices Cotton and Baggallay giving the majority opinion, while Lord Justice Lindley held with Lord Romilly's decision. "Authorities," said Lord Macnaghton in his opinion in the Trego case, "which it is now too late to question, undoubtedly show that a man who has sold the good will of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. * * * Courts of equity could not of course enforce, even in a modified form and within reasonable limits, an agreement, express or implied, which the

Trego v. Hunt, L. R. (1896) A. C. 7; Labouchere v. Dawson, L. R. 13 Eq. 322; Jennings v. Jennings (1898), 1 Ch. 378; Gillingham v. Beddow, L. R. (1900), 2 Ch. 242.

[9] Old Corner Book Store v. Upham, 194 Mass. 101, 80 N. E. 228, 120 Am. St. 532.

[10] Trego v. Hunt, L. R. (1896) A. C. 7. See also Jennings v. Jennings (1898), 1 Ch. 378; Leggott v. Barrett, L. R. 15 Ch. Div. 306; Ginesi v. Cooper, L. R. 14 Ch. Div. 596; Mogford v. Courtenay, 45 L. T. 303.

[11] Labouchere v. Dawson, L. R. 13 Eq. 322.

[12] L. R. 27 Ch. D. 145.

law would have held void on the ground of public policy; nor could they treat the nonobservance of such an agreement as fraudulent or inequitable. And so it has resulted that a person who sells the good will of his business is under no obligation to retire from the field. Trade he undoubtedly may and in the very same line of business if he has not bound himself by special stipulation and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may thus interfere with the custom of his neighbor, as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not, I think, to be excused by any maxim of public policy. * * * It is said that you can not draw the line; but I think that the line may be drawn at this point. * * * There is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with." The above quotation is a clear presentation of the various elements in the principle, and in brief, places the distinction between what a partner or other person, disposing of good will in a business may or may not do, upon a broad moral as well as legal plane, allowing him, in the absence of actual agreement, to compete with the old business, but as an entire stranger to the inside affairs of the old business and not using the knowledge which goes to make up good will and which came from his former connection with the old business as a lever with which to build up his new business. The case of Trego v. Hunt may be considered to have settled the English rule. It has also been held

that a retiring partner engaged in a competing business is not prohibited from dealing with those customers of the old firm who voluntarily and without solicitation choose to deal with him.[13]

§ 318. Soliciting old customers—American holdings.—In several American jurisdictions it is held in accordance with the latest English rule that the former owner, by his voluntary act of sale, has prohibited himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from the customers of the old business and he will be enjoined from so doing,[14] and thus, a copartner who sells his interest in the firm business, together with the good will, may not solicit trade from the customers of the old firm,[15] as where two dentists dissolve partnership, one purchasing the business and good will from the other. The vendor may not

[13] Leggott v. Barrett, L. R. 15 Ch. Div. 306. Compare, however, with Curl Bros. v. Webster (1904), 1 Ch. 685, which holds that the customers of the old firm can not be solicited who had voluntarily and before solicitation become customers of the new firm.

[14] Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. And see Wentzel v. Barbin, 189 Pa. St. 502, 42 Atl. 44; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199. "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with: it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." Trego v. Hunt (1896), A. C. 7, 65 L. J. Ch. (N. S.) 1, 12 Eng. Rul. Cas. 442, quoted in Von Bremen v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293, 21 Ann. Cas. 423.

[15] Burckhardt v. Burckhardt, 36 Ohio St. 261. But compare with this case Brass &c. Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Gordon v. Knott, 199 Mass. 173, 85 N. E. 184, 19 L. R. A. (N. S.) 762n; Althen v. Vreeland (N. J.), 36 Atl. 479; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Von Breman v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.)

solicit the customers of the old firm or act so as to destroy the business he has sold.[16] And one who sells a grocery and cigar business, together with the good will thereof, will be enjoined from soliciting customers of the old firm, who were such at the time of the sale, to trade with the competing firm subsequently organized by him.[17] Even though the retiring partner reserves the right to engage in a competing business, it has been held that he can not personally or otherwise apply to customers of the old business and request them to deal with him in preference to the old firm.[18]

§ 319. Cases holding old customers may be solicited.— But the American cases are unsettled, as to the rights of the vendor to personally solicit old customers. In a strong Michigan case in favor of the principle of allowing personal solicitation it was said:[19] "The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good will be included or not, can not personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. * * * He (the retiring partner) does not agree

293, 21 Ann. Cas. 423; refusing to follow Marcus Ward & Co. v. Ward, 61 Hun 625, 15 N. Y. S. 913, 40 N. Y. St. 792; Kates v. Bok, 141 App. Div. 925, 126 N. Y. S. 606.

[16] Foss v. Roby, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200, 11 Ann. Cas. 571.

[17] Acker, Merrall &c. Co. v. McGaw, 144 Fed. 864. The court said: "It would be a reproach to the law if no adequate remedy could be afforded for the protection of a property so valuable as such a good will against the attack of the vendor who had sold it, and who afterward attempts to regain it to the damage of his vendee."

[18] Burkhardt v. Burkhardt, 5 Ohio Dec. 185. To same effect Gillingham v. Beddow, L. R. (1900), 2 Ch. 242.

[19] Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161. In this case the contract included good will. The court took as its principal authority the case of Pearson v. Pearson, L. R. 27 Ch. Div. 145, which overruled Labouchere v. Dawson. L. R. 13 Eq. 322, which was in turn disapproved by the case of Trego v. Hunt, 1896, A. C. 7, 12 Eng. Rul. Cas. 442, and which restored the doctrine of Labouchere v. Dawson. The Michigan court rendered its decision subsequent to the Pearson case but prior to the Trego case.

that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation or service. * * * He does not pledge a continuance of conditions. * * * He sells only so much of the custom as will continue in spite of his retirement and activity. * * * The right to enter into the same line of business in the same locality,—next door, if you please,—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. * * * The right to engage in business in his own name attaches to the retiring partner and unless expressly so agreed, there is no restraint upon that right." In a Connecticut case holding that a retiring partner may solicit the patrons of the old firm when he does not hold himself out as the successor of the business sold,[20] "Cottrell," said the court, "did not require Babcock to agree, and the latter did not agree, to abstain from the manufacturing of printing presses. By purchasing the good will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more he should have secured it by positive agreement. The express agreement is the measure of his right; and since that conveys a good will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. * * * (Some) courts have been of the opinion * * * that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon

[20] Cottrell v. Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161. See also Fish Bros. Wagon Co. v. LaBelle Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. 72; Vonderbank v. Schmidt, 44 La. Ann. 264, 10 So. 616, 15 L. R. A. 462, 32 Am. St. 336; Close v. Flesher, 8 Misc. 299, 28 N. Y. S. 737, 59 N. Y. St. 283; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

inference to bar him from trade, either totally or partially, and that all restraint of that nature must come from positive agreement and such, we think, is the present tendency of the law." The following detailed propositions are considered established by the weight of authority: "1. Though a retiring partner may have assigned his interest in the partnership business, including the good will thereof, to his copartner, he may, in the absence of express agreement to the contrary, engage in the same line of business in the same locality, and in his own name. 2. He may, by newspaper advertisements, cards and general circulars, invite the general public to trade with him and through the same mediums advertise his long connection with the old business and his retirement therefrom. 3. He will not be allowed however to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence will not be allowed to advertise himself as its successor. 4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm. 5. That no man has a right to sell or advertise his own business or goods as those of another and so mislead the public, and injure such other person."[21]

§ 320. Agreements by partners not to compete.—From a comparison of the above cases with the general law upon the subject, it will be seen that very generally the American cases cited in preceding sections were cases where there is no stipulation as to non-competition, and where there is such a contract, that under proper conditions it will be enforced, not as a matter of good will of itself, but simply as a matter of contract. It must be remembered, however, that such a restriction, even when provided for in the contract, is in the nature of restraint upon trade, upon which the law frowns, and it must be a reasonable restriction in order to be valid. It might be unlimited as to time in a limited and reasonable locality, or it might be unlimited as to place for a limited and reasonable period of time, but to

[21] Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.

attempt to make the restriction upon the withdrawing partner unlimited as to both time and place would be against public policy, and void.[22] Copartners who sell their interest in the partnership business at the same time agreeing not to again engage in that line of business are bound by such contract, if, under all the circumstances, it is reasonable.[23] A partner who sells his interest in the firm business may contract not to start a competitive business nor to work for a competitor.[24] While a partner, as agent of his copartners, might sell the good will of the firm so as to bind the firm, it is not true that he may bind

[22] Maier v. Homan, 4 Daly (N. Y.) 168; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746.

[23] Hursen v. Gavin, 59 Ill. App. 66 (affd. 162 Ill. 377, 44 N. E. 735); Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; American Ice Co. v. Meckel, 109 App. Div. (N. Y.) 93, 95 N. Y. S. 1060; Curtis v. Gokey, 68 N. Y. 300; Thomas v. Miles, 3 Ohio St. 274; Lange v. Werk, 2 Ohio St. 519. "It is thoroughly settled that the good will of business concerns is, though intangible, a species of property transferable from hand to hand as other property." Southworth v. Davison, 106 Minn. 119, 118 N. W. 363, 19 L. R. A. (N. S.) 769n.

[24] Hursen v. Gavin, 59 Ill. App. 66 (affd. 162 Ill. 377, 44 N. E. 735); O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946; Western Dist. Warehouse Co. v. Hobson, 96 Ky. 550, 29 S. W. 308, 16 Ky. L. 869 (all members of the firm agreeing not to re-engage in business for ten years); Moorman v. Parkerson, 127 La. 835, 54 So. 47 (sale of interest in insurance business); Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Boutelle v. Smith, 116 Mass. 111 (binding on both members of the firm); Ropes v. Upton, 125 Mass. 258; Curtis v. Gokey, 68 N. Y. 300; Wooten v. Harris, 153 N. Car. 43, 68 S. E. 898; Siegel v. Marcus, 18 N. Dak. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769n; Lange v. Werk, 2 Ohio St. 519; Thomas v. Miles, 3 Ohio St. 274. A contract by a retiring partner not to engage in the same business, although containing no specific limitation as to territory or time, has, taking into consideration the circumstances of the case, the nature and extent of the business, and the situation, objects and interests of the parties, been construed as applying to the entire United States, but not to other parts of the world, and has been upheld to that extent. Prame v. Ferrell, 166 Fed. 702, 92 C. C. A. 374. See, however, Grand Union Tea Co. v. Lewitsky, 153 Mich. 244, 116 N. W. 1090, to the contrary, decided under a statute providing, "All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

his copartners not to engage in the same line of business.[25] A person, agreeing in general terms not to carry on business in a certain line, is not thereby precluded from acting as agent for another in the same business,[26] even though he allow his name to be used as a partner by the firm for whom he is working, if, in fact, he has no interest therein,[27] and he may further loan money to a competitor of his vendee, upon a mortgage upon the trade premises of the competitor,[28] and the same rule applies where he leases the premises to a competitor.[29] However, if he agrees not to do any act interfering with the business of his vendee, he can not act even as the agent of a competing firm.[30]

§ 321. Breach of contract by entering employ of another. —It has already been mentioned that a retiring partner who sells his interest in a given business together with good will and without any restriction on his right to engage in a competing business may as a general rule establish a new and competing business; but that he can not represent himself as a successor of the old firm or solicit its customers but that he may deal with them if they come to him voluntarily.[31] One who enters the employment of another may thereby breach a covenant not to engage in a rival business, as where on the dissolution of a partnership the retiring partner engages not to conduct the same business heretofore conducted by them in the same city, or with any partner, partner's firm, company, or corporation for a period of two years, it was held that such retiring partner violated his agreement by entering into the employment of another who has engaged in a competing business and practically acting as agent and manager in the conduct thereof.[32]

[25] Moreau v. Edwards, 2 Tenn. Ch. 347.

[26] Bowers v. Whittle, 63 N. H. 147, 56 Am. Rep. 499.

[27] Greenebaum v. Gage, 61 Ill. 46.

[28] Bird v. Lake, 1 H. & M. 338.

[29] Bradford v. Peckham, 9 R. I. 250.

[30] Boutelle v. Smith, 116 Mass. 111.

[31] See ante, § 317 et seq.

[32] Siegel v. Marcus, 18 N. Dak. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769n. For other cases to the same effect, see Jefferson v. Markert, 112 Ga. 498, 37 S. E. 758 (employment but a pretext to cover violation of the agreement); Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083 (held

§ 322. **Sale of good will at involuntary sale.**—The foregoing principles apply only in the case of voluntary sales. The good will which the owners thereof part with under a species of compulsion, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination by the death of one of the parties or pursuant to the articles of the corporation, is a lesser property than the good will which is subject to the voluntary sale and transfer by the owner for a valuable consideration. In sales of the first class, the former owner remains under no legal obligation restricting competition on his part in the slightest degree.[33] Thus a bankrupt after discharge may set up a rival business[34] and may solicit patronage from the customers of the old business.[35] A sale of good will forced upon the surviving partner by the death

that vendor violated his agreement by taking stock in and becoming assistant cashier of a new bank); Pohlman v. Dawson, 63 Kans. 471, 65 Pac. 689, 54 L. R. A. 913, 88 Am. St. 249 (barber who had sold out under a contract not to engage in the barber business in any way violating his agreement by becoming an employé of a rival shop); Meyer v. Labau, 51 La. Ann. 1726, 26 So. 463 (agreement not to engage in mercantile business violated by taking part in conducting a rival business although he had no interest as owner); Emery v. Bradley, 88 Maine 357, 34 Atl. 167 (the promisor carrying on or acting as clerk or agent). See also Anderson v. Ross, 14 Ont. L. Rep. 683; Boutelle v. Smith, 116 Mass. 111; Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654 (affd. 44 N. J. Eq. 604, 17 Atl. 1104); Corwin v. Hawkins, 42 App. Div. (N. Y.) 571, 59 N. Y. S. 603; American Ice Co. v. Meckel, 109 App. Div. (N. Y.) 93, 95 N. Y. S. 1060; Peterson v. Schmidt, 13 Ohio C. C. 205, 7 Ohio C. D. 202.

[33] Von Breman v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293. See Slack v. Suddoth, 102 Tenn. 375, 52 S. W. 180, 45 L. R. A. 589, 73 Am. St. 881.

[34] Walker v. Mottran, L. R. 19, Ch. Div. 335; Hudson v. Osborne, 21 L. T. 386; Crutwell v. Lye, 17 Ves. Jr. 335. See also Vinall v. Hendricks, 33 Ind. App. 413, 71 N. E. 682.

[35] Walker v. Mottram, L. R. 19, Ch. Div. 355; Cruttwell v. Lye, 17 Ves. Jr. 335. He can not so conduct a business, however, as to lead the public to believe that the business set up by him is the same or is a continuation of that which was formerly carried on by him. Hudson v. Osborne, 21 L. T. 386. See also Lawrence v. Times Printing Co., 90 Fed. 24, which holds that one who has acquired a paper and printing plant under foreclosure proceedings may enjoin the mortgagor from publishing a newspaper as the successor of one sold under the mortgage.

of the other member of the firm does not prevent such surviving partner from setting up a competing business and soliciting customers of the old firm.[36]

§ 323. **Personal skill not good will.**—By its very nature the personal skill of one partner can not be considered as constituting any part of the good will, as such, of the firm, which may be sold to pay its debts,[37] although it may, perhaps, be the chief asset of the firm as a producer of income. This is because a partner may at any time withdraw from the firm, yet, as he makes himself liable in damages for such withdrawal unless he can show proper cause for such withdrawal, this personal skill of one partner may, indirectly, in this manner, be of great value to the other partners and creditors.

§ 324. **Taxation of good will—Assessment in condemnation proceedings.**—The value of good will will not be added to the value of shares of stock for the purposes of taxation,[38] and as a general rule good will is not such a kind of property as can be considered for purposes of taxation. But in one English case good will was valued and made liable to internal revenue.[39] In actions for damages in condemnation proceedings, destruction of the good will of a business in the property is not a proper matter for consideration in arriving at the amount of damages.[40]

§ 325. **Action on good will alone.**—It is not necessary for the good will to be coupled with any tangible property in order to become subject to sale, or upon which to base an action,[41] and the good will, in the absence of fraud or misrepresentation, may

[36] Hutchison v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. 390.

[37] McCall v. Moschowitz, 14 Daly (N. Y.) 16, 10 Civ. Proc. 107, 1 N. Y. St. 99.

[38] Spring Valley Works v. Schottler, 62 Cal. 69 (affd. 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48).

[39] Potter v. Inland Revenue, 10 Exch. 147, 18 Jur. 778, 23 L. J. Exch. 345.

[40] Chicago v. Garrity, 7 Ill. App. 474.

[41] Wallingford v. Burr, 17 Nebr. 137, 22 N. W. 350.

afterward prove to be of little or no value, without affecting the legality of the transaction.[42]

§ 326. **Rights of surviving partner in good will.**—Upon dissolution of the firm, the good will, in the absence of a contract to the contrary, is an asset which any of the partners may use to the extent, at least, of using the inside information acquired while in the old firm, in competing for the old customers. However, as the good will of the firm is an asset, if one of the partners in settling up the affairs of the firm, obtains anything of value by reason of the sale of the good will, he must account to the other partner or partners therefor.[43] It has been repeatedly held by the courts that a surviving partner may not claim, by survivorship, the good will of the firm, but must account to the estate of the deceased partner for returns obtained therefrom by him, a share in the good will being an asset of the estate[44] although the contrary rule, in earlier times, prevailed, holding that the good will became the property of the surviving partner upon the death of one member of the firm.[45] Another line of cases has held that the surviving partner has still the right of carrying on, at the old place, the same line of business,[46] although

[42] Cruess v. Fessler, 39 Cal. 336. See Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269.

[43] Dyer v. Shove, 20 R. I. 259, 38 Atl. 498. See Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769.

[44] Brooklyn Trust Co. v. McCutchen, 215 Fed. 952; Joseph v. Herzig, 198 N. Y. 456, 92 N. E. 103; Matter of Welch, 77 Misc. (N. Y.) 427, 137 N. Y. S. 941; Matter of Silkman, 121 App. Div. 202, 105 N. Y. S. 872 (affd. 190 N. Y. 560, 83 N. E. 1131); Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Dougherty v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 68; Rammelsberg v. Mitchell, 29 Ohio St. 22; Holden v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Tennant v. Dunlop, 97 Va. 234, 33 S. E. 620; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Wedderburn v. Wedderburn, 22 Beav. 84; In re David, L. R. (1899), 1 Ch. 378; Beatty v. Dickson, 3 Ont. W. R. 2. Compare Shearman v. Cameron, 76 N. J. Eq. 426, 74 Atl. 979; Brooklyn Trust Co. v. McCutchen, 215 Fed. 952; Inman v. Inkster, 90 Nebr. 704, 134 N. W. 265; In re Welch, 137 N. Y. S. 941, 77 Misc. (N. Y.) 427.

[45] Mason v. Dawson, 15 Misc. (N. Y.) 595, 37 N. Y. S. 90, 72 N. Y. St. 123; Hammond v. Douglas, 5 Ves. 539; Lewis v. Langdon, 7 Sim. 421.

[46] Hutchinson v. Nay, 187 Mass.

even this rule is not universal.[47] Although the cases are not entirely uniform upon the question of the rights of the surviving partner to the good will of the firm business, Mr. Lindley[48] draws a line of distinction between the two ideas. "While a surviving partner," said he, "acquires all the benefit of the good will, he does not do so by virtue of his survivorship. If he did, he might sell the good will for his own benefit, and this he can not do." This distinction is undoubtedly partially correct, from a certain angle, particularly under the English law of earlier periods, but under late American decisions, a somewhat unsatisfactory distinction must be given in order to reconcile the cases, and a rule thus stated, that the good will, strictly speaking, does not go to the surviving partner, but that rights analogous to good will, many of which may even be retained by a person selling the good will, do go to the surviving partner, such as continuing in business, soliciting former customers, etc. This distinction is not wholly logical or satisfactory, but in its defense it may be submitted that the reported cases are open to the same criticism, and we must either take a distinction somewhat vague, or else admit that the decisions are conflicting, which is not really so, taking them as a whole.

§ 327. **Receiverships to save good will.**—A great part of the good will of a business accrues from the continuous operation of the business, and often the greater part of the value of the good will is lost if the business of the firm ceases operation for a few weeks or months. Hence it is often necessary in closing the business of a partnership to have a receiver appointed to carry on the business until it can be sold as a running business.[49] The good will may be sold, at receiver's sale or

262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. 390; Witbeck v. Chittenden, 50 Mich. 426, 15 N. W. 537; Scudder v. Ames, 142 Mo. 187, 43 S. W. 659; Lobeck v. Lee-Clarke-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 795; Fisk v. Fisk, 77 App. Div. 83, 79 N. Y. S. 37, 12 N. Y. Ann. Cas. 228; Staats v. Howlett, 4 Den. (N. Y.) 559; Smith v. Everett, 27 Beav. 446.

[47] Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 202.

[48] Lindley Partnership, p. 861.

[49] Levi v. Karrick, 8 Iowa 150; Jackson v. De Forest, 14 How. Pr.

otherwise, separate and apart from the other assets of the firm, and there is no rule of law disqualifying partners from bidding upon the good will at public auction.[50]

§ 328. Implied disposal of good will by sale of place of business.—It has been said that the conveyance of the place of business of a firm ordinarily carries with it the good will of the business as an incident thereto,[51] and the rule has been carried so far that in one case[52] the rule is adopted that a mortgagee of a house, in possession thereof, need not account in bankruptcy or to the mortgagor for the good will of a business therein, as the court held that the good will of a business passed with the mortgage of the house. Under the rule of Lord Eldon, quoted above, the above cases would have been absolutely correct, as the good will would thereunder have been the probability that the old customers would return to the old place, yet, as has been shown, Lord Eldon's rule is too narrow, and there are other elements which now enter into good will which could, by no possibility, be connected with the location, hence the modern law does not seem to be in accordance with the cases last above quoted. If a partner disposes of all his interest in the firm to his copartner without any mention of the good will or trademarks, such disposal nevertheless carries with it, by implication, according to some cases, the exclusive right to the trademarks,[53]

(N. Y.) 81; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Williams v. Wilson, 4 Sand. Ch. (N. Y.) 379.

[50] Cook v. Collingridge, Jac. 607.

[51] Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384, 22 L. R. A. (N. S.) 907, 18 Ann. Cas. 430 and note; Acme Harvester Co. v. Craver, 110 Ill. App. 413 (affd. 209 Ill. 483, 70 N. E. 1047); Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Boon v. Moss, 70 N. Y. 465; Fite v. Dorman (Tenn.), 57 S. W. 129; Chissum v. Dewes, 5 Russ. 29. See also Tomah Bank v. Warren, 94 Wis. 151, 68 N. W. 549.

[52] Ex parte Punnet, L. R. 16 Ch. Div. 226. Contra: Santa Fe Electric Co. v. Hitchcock, 9 N. Mex. 156, 50 Pac. 332. The lease of a business carries the good will though not mentioned; Lane v. Smythe, 46 N. J. Eq. 443, 19 Atl. 199; Mitchell v. Read, 19 Hun (N. Y.) 418 (affd. 84 N. Y. 556).

[53] Durham Smoking Tobacco Case, Fed. Cas. No. 1475, 3 Hughes (U. S.) 151; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Glen &c. Mfg. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278.

and the good will.[54] So where a partner retires from a firm, assenting or acquiescing to the use of the old place of business by the remaining partners and their use of the firm name, the good will remains with continuing partners as a matter of course.[55] As to the trade-marks, however, there are conflicting decisions, some of which hold contrary to those given above.[56] In view of the conflicting opinions and decisions upon the subject of trade-marks, they should always be specified particularly in the contract of sale, either as going with the other assets, or being retained. It is also well to specifically mention the good will, whether sold or retained. Under a general assignment of all of a firm's property for benefit of creditors it is held that the good will of the business passes to the purchaser at an assignee's sale[57] and the right to use the trade-marks.[58] But where the business is of such a character that good will is not necessarily connected with the establishment, and there is no mention of good will in the contract for sale, it does not pass.[59] Where the business is divided and on dissolution each partner takes one of the offices of the firm in different cities, the one taking the branch office is not liable to account to the receiver of the firm for good will.[60]

§ 329. **Firm name as part of good will.**—There are some cases holding that a sale of the good will of a partnership in-

[54] Kellogg v. Totten, 16 Abb. Pr. (N. Y.) 35; Brass &c. Iron Works Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Gage v. Canada Pub. Co., 11 Ont. App. 402.

[55] Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. 143.

[56] Young v. Jones, Fed. Cas. No. 18159, 3 Hughes (U. S.) 274; Hazard v. Caswell, 93 N. Y. 259, 45 Am. Rep. 198.

[57] Iowa Seed Co. v. Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446; Fish Bros. Wagon Co. v. LaBelle Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. 72.

[58] Hegeman v. Hegeman, 8 Daly (N. Y.) 1; Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. 72.

[59] McMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099. See also Hebert v. Dupaty, 42 La. Ann. 343, 7 So. 580; Costello v. Eddy, 58 Hun (N. Y.) 605, 34 N. Y. St. 565, 12 N. Y. S. 236 (affd. 128 N. Y. 650, 29 N. E. 146).

[60] Somers v. Harris, 161 App. Div. 230, 146 N. Y. S. 572.

cludes the right to use the firm name,[61] especially where one partner purchases and succeeds to the business.[62] The firm name is usually a part of the good will and yet there are some cases where it will not be so considered. For example, an outside purchaser of the property at dissolution sale has no right to use the old firm name, or represent himself as its successor.[63] If one partner purchases the interest of his copartner he can not use the name of the retiring partner in the absence of express contract thereto, in such a manner as to mislead the public into a belief that the retiring partner is still connected with the firm.[64] If there is an express contract the purchasing partner acquires the sole right to use the firm name.[65] Although a firm may, with the consent of a person not a member thereof, use his name in its title, and may under certain conditions acquire an exclusive right thereto, it can not, nevertheless, pass on such right to a person to whom it may sell,[66] and the same rule prevails where a retiring partner assigns to the continuing partner his interest in the old firm name, and the continuing partner

[61] Rogers v. Taintor, 97 Mass. 291; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605; Churton v. Douglas, Johns. 174 5 Jur. N. S. 887; Levy v. Walker, L. R. 10 Ch. Div. 436; Banks v. Gibson, 34 Beav. 566; Caswell v. Hazard, 50 Hun (N. Y.) 230, 2 N. Y. S. 783, 19 N. Y. St. 727 (affd. 121 N. Y. 484, 24 N. E. 707, 18 Am. St. 833); Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543.

[62] Steinfeld v. National Shirt Waist Co., 99 App. Div. 286, 90 N. Y. S. 964; Brass & Iron Works Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82. See Rankin v. Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265.

[63] Reeves v. Denicke, 12 Abb. Pr. (N. S.) (N. Y.) 92.

[64] Blumenthal v. Strauss, 53 Hun (N. Y.) 501, 6 N. Y. S. 393, 23 Abb. N. C. 339, 25 N. Y. St. 421; McGowan Bros. Pump. &c. Co. v. McGowan, 22 Ohio St. 370.

[65] Marcus v. McFarland, 119 Md. 269, 86 Atl. 337. See also Wright Restaurant Co v. Seattle Restaurant Co., 67 Wash. 690, 122 Pac. 348.

[66] Horton Mfg. Co. v. Horton Mfg. Co., 18 Fed. 816. But compare Marcus v. McFarland, 119 Md. 269, 86 Atl. 337, holding that where a father and son formed a partnership under the firm name of the father's name, followed by the words "and son," and the firm name continued, though the father retired, and the membership of the firm changed, the firm name was a fictitious one, and when the son retired from the firm and sold to his copartner the right to use the firm name this gave to the copartner the right to use the firm name in his business as against the son.

then attempts to take in a new partner and continue the business under the old name.[67] It must not be thought, however, that the continuing partner who buys out the business is thus prohibited from advertising himself as the successor of the old firm, or late of the old firm,[68] or even from using the old firm name, provided, of course, it is not so used as to deceive the public into believing the retiring partner is still a member of the firm.[69] In New York the rule seems to be that upon the death of a member the right to use the firm name is not part of the good will, but remains in the survivors.[70] If one partner dies, and the surviving partner continues the business, he may use the name of the surviving partner in the business, as the deceased partner's estate would not become liable thereby,[71] but ordinarily the business so carried on, in the absence of agreement to the contrary, will be subject to the claims of decedent's estate for their interest therein. Practically the same rules as to good will apply in the cases of both trade-marks and in trade names. Either party to the partnership, upon demand, can have them sold and the proceeds distributed. In case of dissolution, with no disposal of a trade-mark, it may be used by any former member in such a way as not to injure the other's rights to so use it.[72]

§ 330. Partnership rights in trade secret.—The mere existence of a partnership which deals in a product manufactured by a secret process does not of itself determine the ownership of such trade secret.[73] But should such trade secret actually

[67] Howland v. Roosevelt, 5 N. Y. S. 75.

[68] Rogers v. Taintor, 97 Mass. 291.

[69] Hallett v. Cumston, 110 Mass. 29; Peterson v. Humphrey, 4 Abb. Pr. (N. Y.) 394. Contra: Fite v. Dorman (Tenn.), 57 S. W. 129.

[70] Kirkman v. Kirkman, 20 Misc. (N. Y.) 211, 45 N. Y. S. 373; Mason v. Dawson, 15 Misc. (N. Y.) 595, 37 N. Y. S. 90, 72 N. Y. St. 123; Campbell v. Campbell, 16 N. Y. S. 165, 70 N. Y. St. 817; Blake v. Barnes, 12 N. Y. S. 69, 26 Abb. N. C. 208 (affd. 58 Hun (N. Y.) 525, 12 N. Y. S. 354, 34 N. Y. St. 919).

[71] Staats v. Howlett, 4 Den. (N. Y.) 559.

[72] Lewis v. Smith, 8 Pa. Co. Ct. 327.

[73] Morison v. Moat, 9 Hare 241, 68 Eng. Reprint 492.

belong to the partnership either partner may, upon the dissolution of the firm and in the absence of any agreement to the contrary, use the same.[74]

§ 331. Good will and professional partnerships.—Professional associations are treated in many ways different from associations for business purposes, owing to their peculiar nature. Some states, for example, prohibit any corporations for professional ends, and the general law recognizes the distinction in partnerships for this purpose. Customers go to a business partnership, as a rule, because of location, and of the price and quality of goods or services purchased, in addition to personal reasons, while in professional relations they come, as a usual rule, on account of their confidence in the personal skill and integrity of one or more of the partners. The office, or location, may have some good will value, but it is, as a rule, not very highly regarded.[75] Hence it is usually considered that the good will of a partnership has little value as such. However, if by any chance, there is a value, and a sale of the same, the proceeds become the property of all the partners, and this is even so regardless of the actual value of the good will sold.[76] In many cases it has been held that good will can not arise in a professional business which depends on personal skill and confidence.[77] However, it is recognized that lawyers and physicians may sell their busi-

[74] Baldwin v. VonMicheroux, 5 Misc. (N. Y.) 386, 25 N. Y. S. 857 (affd. 83 Hun (N. Y.) 43, 31 N. Y. S. 696, 64 N. Y. St. 382).

[75] Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543.

[76] Wiley's Appeal, 8 Watts & S. (Pa.) 244; Christie v. Clark, 16 Up. Can. C. P. 544.

[77] Douthart v. Logan, 86 Ill. App. 294 (affd. 190 Ill. 243, 60 N. E. 507) (buying and selling produce on commission); Smith v. Smith, 51 La. Ann. 72, 24 So. 618 (insurance agents); Tierney v. Klein, 67 Miss. 173, 6 So. 739, 8 So. 424 (insurance agents); Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37 (physicians); Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769 (insurance agents); McCall v. Moschowitz, 10 Civ. Proc. (N. Y.) 107, 14 Daly 16, 1 N. Y. St. 99 (dressmaking); Hirschberg v. Bacher, 159 Wis. 207, 149 N. W. 383 (insurance agency); Farr v. Pearce, 3 Madd. 74 (surgeons); Austin v. Boys, 24 Beav. 598, 2 DeG. & J. 626 (solicitors); Arundel v. Bell, 52 L. J. Ch. 537 (solicitors); Steuart v. Gladstone, 10 L. R. Ch. Div. 626 (commission merchants).

ness or sell an interest in it to younger members in the profession who become partners, and gain some advantage from associating with an older man in the profession, and in that sense there is a good will in professional pursuits which is of value.[78]

[78] Webster v. Williams, 62 Ark. 101, 34 S. W. 537; Tichenor v. Newman, 186 Ill. 264, 57 N. E. 826; Dwight v. Hamilton, 113 Mass. 175; Doty v. Martin, 32 Mich. 462; French v. Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. 733; Butler v. Burleson, 16 Vt. 176; Bunn v. Guy, 4 East 190; Snider v. McKelvey, 27 Ont. App. 339.

CHAPTER XIII

RIGHTS OF PARTNERS INTER SESE

SECTION

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§ 340. In general.—This chapter will be given to a discussion of the rights of partners inter sese, leaving their duties and liabilities to a later discussion in the succeeding chapter. Such a division is, of necessity, somewhat unsatisfactory and

can not be logically followed, inasmuch as every right on one side implies a corresponding duty on the other side, and there must, necessarily, be a certain repetition of authorities, but it is submitted that this is the only method by which to view the question from all angles, and that it is better that there be some repetition than that some phases of the question be omitted entirely.

§ 341. Utmost good faith—A right.—Owing to the peculiarly confidential and hazardous nature of partnership, one of the first and most essential rights of each partner is that his copartners exercise the greatest good faith in all partnership matters.[1] He has the right to require good faith during the negotiations from persons with whom he is contemplating forming a partnership.[2] This principle is, however, as to persons who are about to enter into a partnership, not so well established or so universal of application as it is where the relationship has been established. This is shown by a New Jersey case[3] which holds that while partners are bargaining with each other for the formation of a partnership, the rule of caveat emptor applies, and each may obtain as large a share of advantages in the contemplated firm as he justly can. If one or more copartners have abandoned the partnership enterprise, leaving the burdens thereof to be borne by their associates, they are thereby estopped from afterward objecting as to some individual benefits the active partners may have acquired.[4] In a Georgia case[5] the court held that, should a person, who is a member of a partnership organized

[1] Warren v. Schainwald, 62 Cal. 56; Pierce v. McClellan, 93 Ill. 245; Scruggs v. Russell, McCahon (Kans.) 39, 1 Kans. (Dass. ed.) 478; Anderson v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459; Gray v. Portland Bank, 3 Mass. 264, 3 Am. Dec. 156; Herrick v. Ames, 8 Bosw. (N. Y.) 115, 21 N. Y. Super. Ct. 115; Beam v. Macomber, 33 Mich. 127; Peters v. Horbach, 4 Pa. St. 134; Yost v. Critcher, 112 Va. 870, 72 S. E. 594.

[2] See cases cited in note 40, § 400, on good faith a duty.

[3] Uhler v. Semple, 20 N. J. Eq. 288.

[4] Miller v. Chambers, 73 Iowa 236, 34 N. W. 830, 5 Am. St. 675; Lowry v. Cobb, 9 La. Ann. 592.

[5] Parnell v. Robinson, 58 Ga. 26.

for the purpose of storing cotton, erect buildings at his own expense, after his partner had declined to supply other warehouses, and store cotton in them in his own interest, the other partner could not claim any interest in the profits thereof, especially if the partner thus dealing individually did not allow it to interfere with his duties to the partnership. Two Ohio cases[6] both decided by the Supreme Court in the same year, carry the principle to a considerable length, holding that the greatest good faith is required, not alone for a general partnership, but as well in a partnership for a single transaction. Lack of good faith is, in effect, practically a form of fraud, and consequently will not be presumed, but must be established by satisfactory proof.[7] In many respects good faith includes many of the other rights and powers given herein, but in order to avoid confusion, each will be treated separately.

§ 342. Good faith—Partnership a trust relation.—The partnership relation is one of trust and confidence, and the members of a firm sustain a trust relation toward each other with reference to partnership matters.[8] Partnership is "eminently a

[6] Hulett v. Fairbanks, 40 Ohio St. 233; Yeoman v. Lasley, 40 Ohio St. 190.

[7] Pierce v. Jackson, 21 Cal. 636; Jenkins v. Peckinpaugh, 40 Ind. 133.

[8] Patrick v. Bowman, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Breaux v. LeBlanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869, Ann. Cas. 1912 B, 1095n; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Baker v. Brown, 151 N. Car. 12, 65 S. E. 520; Bennett v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934; Sexton v. Sexton, 9 Grat. (Va.) 204; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. See also Bestor v. Barker, 106 Ala. 240, 17 So. 389; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Pierce v. McClellan, 93 Ill. 245; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Pomeroy v. Benton, 57 Mo. 531; Martin v. Lutkewitte, 50 Mo. 58; Marston v. Gould, 69 N. Y. 220; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Patterson v. Lilly, 90 N. Car. 82; Forsyth County v. Lash, 89 N. Car. 159; Henson v. Byrne (Tex. Civ.

relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly-created entity,—the partnership,—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a cestui que trust—a trustee, so far as his own duties bind him; a cestui que trust, so far as duties rest on his copartners."[9] "There can be no question but that the law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and that each partner, being the agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees, in all matters which affect the common interest."[10] "There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and property rights are subject to a large extent to the control and administration of another."[11] Intentional concealment[12] and misrepresentation are, as between partners, species of fraud which will not be tolerated.[13] But to

App.), 41 S. W. 494; Grant v. Hardy, 33 Wis. 668.

[9] Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97. See also Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948.

[10] Edwards v. Johnson, 90 S. Car. 90, 72 S. E. 638.

[11] Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236.

[12] "In the requirement of good faith between partners, naturally, deceit, concealment, and false representations are forbidden." Whitney v. Dewey, 158 Fed. 385. See further Aas v. Benham (1891), 2 Ch. 244, 65 L. T. 25; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Zahn v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4. See also Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 1; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Sexton v. Sexton, 9 Grat. (Va.) 204; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236.

[13] "Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner, and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse

whatever extent the law may penalize bad faith in a partner, it has been held that such bad faith will not be presumed,[14] and that a copartner alone can raise the cry of fraud. "If a member enter into a transaction in his own behalf, which is within the scope of the partnership business, his copartner may insist that it is a fraud upon him and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and is not available to third parties for the purpose of fixing a liability upon the partnership when such claim has not been asserted."[15]

§ 343. Right to share profits.—Profit sharing may be, as has been heretofore shown, a test, an essential element of, and, in fact, the object of partnership, hence it takes its place as one of the chief rights of a partner that he have a share of the profits. In the absence of agreement to the contrary partners share equally in profits and losses.[16] Where one party has refused to furnish his agreed share of the money, he can not participate in profits made by transactions such as were contemplated and carried on by the other party.[17]

§ 344. Right to participate in management—Exclusion from management.—Inasmuch as there is a right to participate in profits by each partner, mutual agency, unlimited liability for debts and joint ownership of the business, there is, as a matter of right, in the absence of an agreement to the contrary, a right to each partner of participating in the management of

pressure of any kind. Civ. Code, §§ 2410, 2411." Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219. See also Mattern v. Canavan, 3 Cal. App. 493, 86 Pac. 618; Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Azbill v. Wathen (Ky.), 115 S. W. 756; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Finn v. Young, 50 Wash. 543, 97 Pac. 741; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208.

[14] Jenkins v. Peckinpaugh, 40 Ind. 133.

[15] Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[16] Eilers Music House v. Reine, 133 Pac. 788, 65 Ore. 598. See § 295, ch 11, on proportionate shares of partners.

[17] Campbell v. Dotson, 149 Ky. 824, 149 S. W. 1129.

the partnership business. Growing out of this right to participation in the management of the firm business are powers to do certain acts within the scope of the business. These powers will be considered in a succeeding chapter on the power of a partner to bind the firm.[18] Ordinarily, when no agreement otherwise has been entered into,[19] or must be implied, the right to manage and conduct the partnership business reposes equally in each one of the several partners, and this, though they be unequally interested in the partnership profits and losses. It follows, therefore, that a member of the firm can not be rightfully excluded by his associate or associates from active participation in the affairs of the common business[20] and ordinarily wilful

[18] See ch. 15 infra.

[19] Anthony v. Wheatons, 7 R. I. 490. See further Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578; Einstein v. Schnebly, 89 Fed. 540.

[20] "The rule of law as to the powers of the members of a partnership in the conduct of its business has been correctly stated thus: 'In the absence of an express agreement to the contrary, the powers of the members of an ordinary partnership are in all respects equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern. * * * Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the court between partners as the improper exclusion of one of them by the others from taking part in the management of the partnership business. It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others; and that, where such an agreement is entered into it is not competent for those who have agreed to take no part in the management to transact the partnership business without the consent of the other partners. Lindl. Partn. *540.' From this citation it appears that one partner can not have an exclusive right to manage the affairs of the partnership unless such exclusive right be expressly granted by the partnership agreement, and, furthermore, that in the absence of such an express agreement it is gross misconduct for one partner to exclude the other from taking part in the management of the partnership business." Einstein v. Schnebly, 89 Fed. 540. "The exclusion of a partner from his rightful share in the profits or management of the business, and from his right to inspect the books and to be informed of the state of the accounts, is ground for an injunction." Miller v. O'Boyle, 89 Fed. 140. See further, Peacock v. Peacock, 16 Ves. Jr. 49; Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. ed.

exclusion of a partner from participation in management is ground for dissolution,[21] but it has been held that the expulsion of one partner from the partnership can be accomplished by a majority of his copartners when, applying the strictest test, the articles of agreement authorize such a step.[22] So the rule is thus stated in the Uniform Partnership Act. "All partners have equal rights in the management and conduct of the partnership business."[23] Where one partner gives instructions to his associate who is equal both in power and interest with him, it has been held that the recipient may regard the instructions as in the nature of advice subject to be deviated from according to circumstances.[24] Where persons in a neighborhood telephone exchange are partners, those who withdraw or secede can not dispossess by force those in possession, or so assign their interests as to authorize such dispossession.[25]

§ 345. Rights in firm property.—In general, it may be said that a partner has at all times the right to possession of the firm property jointly with his copartner, and one partner has no right to exclude the other from such possession, except by agree-

955; Miller v. O'Boyle, 89 Fed. 140; Harris v. Harris, 132 Ala. 208, 31 So. 355; Meinhard, Schaul Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; Pirtle v. Penn, 3 Dana (Ky.) 247, 28 Am. Dec. 70; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154; Wilcox v. Pratt, 52 Hun (N. Y.) 340, 23 N. Y. St. 686, 5 N. Y. S. 361 (affd. 125 N. Y. 688, 25 N. E. 1091, 3 Silvernail Ct. App. 199); Marten v. Van Schaick, 4 Paige (N. Y.) 479; Jackson v. De Forest, 14 How. Pr. (N. Y.) 81; Gilbert v. Howard Automatic Mach. Co., 147 N. Car. 308, 61 S. E. 176; Holder v. Shelley (Tex. Civ. App.), 118 S. W. 596. And compare Roberts v. Eberhardt, Kay 148, 23 L. J. Ch. 201, 2 W. R. 125; Decatur Land Co. v. Cook (Ala.), 27 So. 559; Montjoys v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Adams v. Kable, 6 B. Mon. (Ky.) 384, 44 Am. Dec. 772; Cougot v. Rodriguez, 1 La. 508.

[21] Barnes v. Jones, 91 Ind. 161; Hottenstein v. Conrad, 9 Kans. 435; Parkhurst v. Muir, 7 N. J. Eq. 307; Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40.

[22] Blisset v. Daniel, 10 Hare 493; 1 Eq. Rep. 484, 18 Jur. 122, 1 W. R. 529.

[23] Uniform Partnership Act, § 18 (e).

[24] Cougot v. Rodriguez, 1 La. 508.

[25] Moore v. Hillsdale County Telephone Co., 171 Mich. 388, 137 N. W. 241.

ment. The nature of the interest of a partner and his rights to the possession of firm property have been discussed.[27] The rights of partners in firm property on dissolution will be considered later.[28]

§ 346. Right to information about business.—There is no doubt but that any partner has the right (at least in the absence of a stipulation to the contrary) to inspect partnership books at any reasonable time and to have any information desired as to the condition or management of the business of the partnership. This right grows out of, and is necessarily implied from, the theory of equal powers of participation in the management of the firm business, and has never, perhaps, been seriously questioned.[29] This right to the inspection of books may be exercised through any proper agent of the partner if a person to whom the other partners can make no reasonable objection and who undertakes to keep the information gained confidential.[29a] Under the Uniform Partnership Act: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partners under legal disability."[30]

§ 347. Right to benefit of information received by partner.—As has heretofore been shown, the utmost good faith must be exercised between partners, and if one partner obtains any information concerning partnership matters, his partners are entitled to the benefit thereof. The reason is obvious, as the information may be as valuable to the partnership, and as much an asset thereof, as tangible profits, and it would be manifestly unjust for a partner to withhold anything of value from the firm. Each partner is under an obligation to make a full and fair disclosure to the others of all material facts which are known

[27] See §§ 291, 292, 293 ante.

[28] See chaps. 19, 20, 21.

[29] Yorks v. Tozer, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. 395; Goodman v. Whitcomb, 1 Jac. & Walk. 589; Devall v. Burbridge, 6 Watts & S. (Pa.) 529.

[29a] Bevan v. Webb (1901), 2 Ch. 59, 2 B. R. C. 953 and note; Brown v. Perkins, 2 Hare 540. Compare State ex rel. Martin v. Bienville Oil Works Co., 28 La. Ann. 204; Cameron v. M'Murray, 17 Dunlop 1142.

[30] Uniform Partnership Act, § 20.

to him and not to the others.[31] This rule, naturally, applies only to firm affairs.

§ 348. **Right to conduct other business.**—The right of a partner to conduct another business depends upon a variety of conditions or considerations. As this right is inseparably connected with the corresponding duties, and is discussed hereafter under the head of Duties, it will perhaps be sufficient here to state as the general and usual rule upon the subject, that a partner can conduct a separate business for his own benefit, providing it is noncompeting and nonconflicting and does not interfere with the proper application of time, skill and financial aid which the partner owes to the firm. This right may be changed by contract, express or implied.[32] Generally, however, the relation of trust and confidence relates only to the partnership business, and a partner may engage in an enterprise outside of and not connected with the partnership.[33] He is under no obligation to account to the partnership for the profits derived from such outside business, even though the partnership agreement provided that he should not engage in any other business.[34]

§ 349. **Right to reimbursement for expenses.**—It has been seen that a partner may incur obligations for and on behalf of the firm, within the apparent scope of the firm business. Therefore, if he incurs expense in the transaction of the firm business, he may be reimbursed by the firm, provided that the expense

[31] Baker v. Cummings, 4 App. D. C. 230; Patrick v. Bowman, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Warren v. Schainwald, 62 Cal. 56; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777 (affd. 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47); Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459.

[32] See § 397 on "Duty not to conduct competing business" and § 387 on "Duty to devote time and skill to business."

[33] Sullivan v. Louisville &c. R. Co., 128 Ala. 77, 30 So. 528; Belcher v. Whittemore, 134 Mass. 330. See also Aas v. Benham (1891), 2 Ch. 244, 65 L. T. 25; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 20.

[34] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Mullaney v. Duffy, 145 Ill. 559, 33 N. E. 750; Murrell v. Murrell, 38 La.

so incurred was in good faith and was reasonably necessary.[35] This may include such items as repairs to firm property,[36] office expenses,[37] rent of a building,[38] prison expenses of a partner seized under an execution against his body on a judgment against the firm,[39] or, in a universal partnership under Spanish law, each partner's personal and household expenses.[40] The general rule has been limited by the decision in an Alabama case[41] which holds that personal expense of a partner while engaged in partnership business can not be charged against the firm. However, under the general rule as to mutual agency of the partners, and also as to their obligation to use their best efforts in behalf of the firm, in the rule laid down in the last above cited case, in order to be considered general, the term "personal expense" must be considered to be such an expense as must be considered strictly personal to the partner, and having no connection with his expenses in behalf of the firm business, and that necessary and actual expense incurred by him for traveling, etc., may be allowed, while expenses incurred by him purely for pleasure or personal matters which are not incurred in behalf of and for the benefit of the firm, can not be allowed, coming under the above interpretation of "personal expenses." A United States case allows a partner reimbursement for all personal expenses

Ann. 1233; Dean v. MacDowell, 8 Ch. Div. 345, 47 L. J. Ch. 537, 38 L. T. 862, 26 W. R. 486.

[35] Van Tine v. Hilands, 142 Fed. 613; Parsons v. Jennings, 71 Conn. 494, 42 Atl. 630; Pard v. Clark, 24 Conn. 370; Stuart v. McKichan, 74 Ill. 122; Harris' Succession, 39 La. Ann. 443, 2 So. 39, 4 Am. St. 269; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Roberts v. Herryford, 54 Mo. App. 365; Inglis v. Floyd, 33 Mo. App. 565; Onderdonk v. Hutchinson, 6 N. J. Eq. 632; Wilson v. Lineberger, 83 N. Car. 524; Gordon v. Moore, 134 Pa. St. 486, 19 Atl. 753; Carhart v. Brown, 86 Tex. 425, 25 S. W. 415; Brigham v. Dana, 29 Vt. 1; Pabalan v. Velez, 22 Philippine 29; Burden v. Burden, 1 Ves. & B. 170, 12 R. R. 210; In re Court Grange Silver Lead Co., 2 Jur. (N. S.) 1203.

[36] Mason v. Gibson, 73 N. H. 190, 60 Atl. 96; Mumford v. Nicoll, 20 Johns. (N. Y.) 611.

[37] Gonzalez v. Smith, 66 Fla. 85, 62 So. 913.

[38] Talbert v. Hanlin, 86 S. Car. 523, 68 S. E. 764.

[39] Day v. Morte, 2 Mart. (N. S.) (La.) 90.

[40] Reynaud v. Peytavin, 13 La. 121.

[41] Glover v. Hembree, 82 Ala. 324, 8 So. 251.

while away from home on firm business.[42] So where a partner pays debts of the firm or pays an individual judgment against him on a firm debt, or takes other necessary risks for the firm, he is entitled to repayment.[43] But a partner may make an agreement depriving himself of the right to reimbursement for expenses.[44]

§ 350. Right to compensation for services for firm.—One question which has been the subject of as much controversy and litigation as any other in partnership relations, is whether or not a partner is, in the absence of agreement therefor, entitled to compensation for services rendered to the firm. Of course, if there is a contract for compensation, whether it be express or implied, there is an undoubted right to the benefits thereunder.[45] In general, however, the "loss or expense" category to which contribution attaches does not, unless it has been otherwise expressly or impliedly agreed,[46] include services ren-

[42] Withers v. Withers, 8 Pet. (U. S.) 355, 8 L. ed. 972.

[43] Butler v. Butler, 164 Ill. 171, 45 N. E. 426 (affg. 61 Ill. App. 51); Stone v. Wendover, 2 Mo. App. 247; Erben v. Heston, 202 Pa. 406, 51 Atl. 1025; Hoxie v. Farmers' &c. Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Wright v. Hunter, 5 Ves. 792.

[44] Consolidated Bank v. State, 5 La. Ann. 44; Fairfield v. Day, 71 N. H. 63, 61 Atl. 263; Sibley v. Starkweather, 53 Hun (N. Y.) 631, 6 N. Y. S. 81, 25 N. Y. St. 776, 2 Silv. 472; Magruder v. McCandlis, 3 Ohio Dec. 269.

[45] Gaston v. Kellogg, 91 Mo. 104, 3 S. W. 589; Caldwell v. Leiber, 7 Paige Ch. (N. Y.) 483; Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Godfrey v. Templeton, 86 Tenn, 161, 6 S. W. 47; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep.

[46] Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Adams v. Warren (Ala.), 11 So. 754; Weeks v. McClintock, 50 Ark. 193, 6 S. W. 734; Pierce v. Scott, 37 Ark. 308; Haller v. Williamowicz, 23 Ark 566; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169; Askew v. Springer, 111 Ill. 662; Heckard v. Fay, 57 Ill. App. 20; Lee v. Davis, 70 Ind. 464; Levi v. Karrick, 13 Iowa 344; Stone v. Mattingly, 14 Ky. L. 113, 19 S. W. 402; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Cramer v. Bachman, 68 Mo. 310; Coddington v. Idell, 29 N. J. Eq. 504; Caldwell v. Leiber, 7 Paige Ch. (N. Y.) 483; Hagenbuchle v. Schultz, 69 Hun (N. Y.) 183, 53 N. Y. St. 598, 23 N. Y. S. 611; Myers v. Kirby, 9

dered in carrying on the partnership business,—a member of the firm not being thus permitted to add to his profits by demanding allowance and receiving compensation for that which he is ordinarily under obligation to donate, for in the absence of a contract for compensation, each partner must give his best efforts to the business of the partnership without any compensation therefor other than the benefit he may derive by reason of his interest in the firm. In other words, the law presumes that the absence of any agreement for compensation necessarily implies that each partner relies upon the profit arising from the business and his partnership interest therein for his compensation.[47] According to the Uniform Partnership Act: "No part-

Ohio Dec. 297, 12 Cinc. L. Bul. 78; Mann v. Flanagan, 9 Ore. 425; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Emerick v. Moir, 124 Pa. St. 498, 17 Atl. 1; Shriver's Appeal, 118 Pa. St. 427, 12 Atl. 553; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Eakin v. Shumaker, 12 Texas 51; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare Williams v. McKee, 13 Ky. L. 143; Kinney v. Maher, 156 Mass. 252, 30 N. E. 818; Frank v. Webb, 67 Miss. 462, 6 So. 620; Hunter v. Little, 17 N. Y. Wkly. Dig. 500; Gresham v. Harcourt (Tex. Civ. App.), 50 S. W. 1058.

[47] Uniform Partnership Act, § 18(f). Where "the firm was insolvent, neither partner had the right to draw a salary." Miller v. Electrical Supply &c. Co., 46 Colo. 221, 103 Pac. 290. "The general rule is that, though each partner is bound to bestow his services and labor with diligence and skill, he is not entitled to any reward or compensation, unless there be an express stipulation between the partners for that purpose." Major v. Todd, 84 Mich. 85, 47 N. W. 841, "The general rule is well settled, * * * that 'in the absence of special agreement, a partner is not entitled to compensation for his services for the partnership, but must be content with his share of the profits, if any.'" Ruggles v. Buckley, 175 Fed. 57, 99 C. C. A. 73, 27 L. R. A. (N. S.) 541. See also Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Glover v. Hembree, 82 Ala. 324, 8 So. 251; Haller v. Willamowicz, 23 Ark. 566; Griggs v. Clark, 23 Cal. 427; Tillotson v. Tillotson, 34 Conn. 335; Reybold v. Jefferson 1 Harr. (Del.) 401, 26 Am. Dec. 401; Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63; Valentin v. Sarrett, 25 Idaho 517, 138 Pac. 834; Burgess v. Badger, 124 Ill. 228, 14 N. E. 850; McBride v. Stradley, 103 Ind. 465, 2 N. E. 358; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Mills v. Fellows, 30 La. Ann. 824; Bevans v. Sullivan, 4 Gill (Md.) 383; Duff v. Maguire, 107 Mass. 87; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Frank v. Webb, 67 Miss. 462, 6 So. 620; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Younglove v. Liebhardt, 13

ner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reason-

Nebr. 557, 14 N. W. 526; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431; Butner v. Lemly, 58 N. Car. 148; Philips v. Turner, 22 N. Car. 123; Cameron v. Francisco, 26 Ohio St. 190; Mann v. Flanagan, 9 Ore. 425; Lindsey v. Stranahan, 129 Pa. St. 635, 18 Atl. 524; Lane v. Roche, Riley Eq. (S. Car.) 215; Piper v. Smith, 1 Head. (Tenn.) 93; Stebbins v. Willard, 53 Vt. 665; Frazier v. Frazier, 77 Va. 775; Kyle v. Griffin (W. Va.), 85 S. E. 559; Gay v. Householder, 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914 C, 297n; Roots v. Mason City Salt &c. Co., 27 W. Va. 483; Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051; Jardine v. Hope, 19 Grant's Ch. (Up. Can.) 76; Robinson v. Anderson, 20 Beav. 98. See further Glover v. Hembree, 82 Ala. 324, 8 So. 251; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Adams v. Warren (Ala.), 11 So. 754; Zimmerman v. Huber, 29 Ala. 379; Pierce v. Scott, 37 Ark. 308; Haller v. Willamowicz, 23 Ark. 566; Reybold v. Jefferson, 1 Har. (Del.) 401, 26 Am. Dec. 401; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Van Duzer v. McMillan, 37 Ga. 299; Askew v. Springer, 111 Ill. 662; Ligare v. Peacock, 109 Ill. 94; O'Brien v. Hanley, 86 Ill. 278; Hanks v. Baber, 53 Ill. 292; Cook v. Phillips, 16 Ill. App. 446; Gerard v. Gateau, 15 Ill. App. 520; Strattan v. Tabb, 8 Ill. App. 225; Lee v. Davis, 70 Ind. 464; Boardman v. Close, 44 Iowa 428; Levi v. Karrick, 13 Iowa 344; Insley v. Shire, 54 Kans. 793, 39 Pac. 713, 45 Am. St. 308; Edelen v. Walker, 21 Ky. L. 839, 53 S. W. 38; Chamberlain v. Sawyers, 17 Ky. L. 716, 32 S. W. 475; Tilford v. Forsythe, 14 Ky. L. (abstract) 335; Hayden v. Crouch, 12 Ky. L. (abstract) 893; Herndon v. Terrell, 12 Ky. L. (abstract) 96; Atherton v. Cochran, 11 Ky. L. 185, 9 S. W. 519, 11 S. W. 301; Sims v. Banta, 9 Ky. L. (abstract) 286; Glenn v. Sims, 5 Ky. L. (abstract) 775; Boyd v. Tabb, 5 Ky. L. (abstract) 516; Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467; Mills v. Fellows, 30 La. Ann. 824; Hill v. Matta, 12 La. Ann. 179; Dunlap v. Watson, 124 Mass. 305; Bevans v. Sullivan, 4 Gill (Md.) 383; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Frank v. Webb, 67 Miss. 462, 6 So. 620; Randle v. Richardson, 53 Miss. 176; Gaston v. Kellogg, 91 Mo. 104, 3 S. W. 589; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Inglis v. Floyd, 33 Mo. App. 565; Warren v. Raben, 33 Nebr. 380, 50 N. W. 257; Folsom v. Marlette, 23 Nev. 459, 49 Pac. 39; Coddington v. Idell, 29 N. J. Eq. 504; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431; Nicoll v. Huntington, 1 Johns. Ch. (N. Y.) 166; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Eckert v. Clark, 14 Misc. (N. Y.) 18, 69 N. Y. St. 491, 35 N. Y. S. 118; Paine v. Thacher, 25 Wend. (N. Y.) 450; Lyon v. Snyder, 61 Barb. (N. Y.) 172; Coursen v. Hamlin, 2 Duer (N. Y.) 513; Dougherty v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 68; Parker v. Day, 12 Misc. (N. Y.) 510, 33 N. Y. S. 676, 67 N. Y. St. 378; Skinner v. White, 1 Hopk. Ch. (N.

able compensation for his services in winding up the partnership affairs."[48] It has been held, that where certain partners, in the articles of partnership, agree to give another partner a certain amount to manage the business, it is really a firm obligation and not a personal one of the other partner's, and must be paid out of partnership funds.[49]

§ 351. Compensation where services are unequal.—The general rule that a partner is not entitled to compensation for services to the firm has been approved and applied, from time to time, even where the services of the several partners in behalf of the common enterprise have not been equal either in extent or

Y.) 107; Gilhooly v. Hart, 8 Daly (N. Y.) 176; Salomon v. Shinner, 5 N. Y. Wkly. Dig. 491; Butner v. Lemly, 58 N. Car. 148; Anderson v. Taylor, 37 N. Car. 420, 38 Am. Dec. 689; Philips v. Turner, 22 N. Car. 123; Buford v. Neely, 17 N. Car. 481; Cameron v. Francisco, 26 Ohio St. 190; Myers v. Kirby, 9 Ohio Dec. 297, 12 Cinc. L. Bul. 78; Rohr v. Pearson, 16 Ore. 325, 14 Pac. 297; Mann v. Flanagan, 9 Ore. 425; Delp v. Edlis, 190 Pa. St. 25, 42 Atl. 462; Lindsey v. Stranahan, 129 Pa. St. 635, 18 Atl. 524; Shriver's Appeal, 118 Pa. St. 427, 12 Atl. 553; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Cunliff v. Dyerville Mfg. Co., 7 R. I. 325; Cothran v. Knox, 13 S. Car. 496; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Berry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; Hooker v. Williamson, 60 Tex. 524; Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. 889; Stebbins v. Willard, 53 Vt. 665; Scott v. Boyd, 101 Va. 28, 42 So. 918; Forrer v. Forrer, 29 Grat. (Va.) 134; Taylor v. Dorr, 43 W. Va. 351, 27 S. E. 317; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593; Drew v. Ferson, 22 Wis. 651. See also Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Nevills v. Moore Min. Co., 135 Cal. 561, 67 Pac. 1054; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Lassiter v. Jackman, 88 Ind. 118; Young v. Scoville, 99 Iowa 177, 68 N. W. 670; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Younglove v. Liebhardt, 13 Nebr. 557, 14 N. W. 526; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167; Wisner v. Field, 11 N. Dak. 257, 91 N. W. 67. And compare Parker v. Day, 155 N. Y. 383, 49 N. E. 1046. A managing partner, who employs his minor children, with the consent of the other partner, is entitled to compensation for their services. Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467. See further Zimmerman v. Huber, 29 Ala. 379.

[48] Uniform Partnership Act, § 18(f).

[49] Weaver v. Upton, 7 Ired. (N. Car.) 458.

in value.[50] "It is undoubtedly true, as a general rule, that partners are not entitled to charge each other, or the firm of which they are members, for their services in the copartnership business, unless there is a special agreement to that effect, or such agreement can be implied from the course of dealing between them. By the well-settled law of partnership, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of value; for services to the firm can not, from their very nature, be estimated and equalized by compensation of differences. In the absence, therefore, of any special provision allowing compensation for services, the law will not make any, nor infer one from the greater industry or greater ability of any one

[50] "We believe the rule to be well settled that, in the absence of a stipulation to that effect, one partner is not entitled to charge his copartners for his services, or because he has done more than his just proportion of work. The law never undertakes to measure and to settle between the partners their various and unequal services bestowed on the joint business." Burgess v. Badger, 124 Ill. 288, 14 N. E. 850. "The general rule, no doubt, is that a partner is entitled to nothing extra for any inequality of services rendered by him as compared with that rendered by his copartner. * * * Though courts will not undertake to equalize partners with reference to the personal services rendered by them, respectively, in conducting the firm business, there is no reason why the parties can not and should not do it by their own voluntary agreement, whether made before or after the services are rendered." Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72. See also Boothe v. Summit Coal Mining Co., 72 Wash. 679, 131 Pac. 252; Williams v. Pedersen, 47 Wash. 472, 92 Pac. 287, 17 L. R. A. (N. S.) 384 and note; Baker v. Cummings, 8 App. D. C. 515; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; King v. Hamilton, 16 Ill. 190; Roach v. Perry, 16 Ill. 37; Lewis v. Moffett, 11 Ill. 392; Heckard v. Fay, 57 Ill. App. 20; Brownell v. Steere, 29 Ill. App. 358 (affd. 128 Ill. 209, 21 N. E. 3); Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405; Insley v. Shire, 54 Kans. 793, 39 Pac. 713, 45 Am. St. 308; Adam's Admr. v. Ringo, 79 Ky. 211, 1 Ky. L. (abstract) 251; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Heath v. Waters, 40 Mich. 457; Reily v. Russell, 34 Mo. 524; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Murray v. Johnson, 1 Head. (Tenn.) 353; Piper v. Smith, 1 Head. (Tenn.) 93; Stebbins v. Willard, 53 Vt. 665; Drew v. Ferson, 22 Wis. 651. See cases cited in § 354, implied contract for compensation.

partner. The doctrine seems to be that partners are considered as meeting on common ground, each engaged to do all he can for the common good; and whatever any one does, he has no claim for anything beyond his equal share of the common benefit without the consent of his copartners."[51] As said in another case:[52] "Where there is no special agreement to that effect, partners are not entitled to charge each other for their services in the management of the concern; and the law never undertakes to settle between them their various and unequal services in the transaction of their private affairs. * * * The attempt would be altogether impracticable. One man may possess advantages over his partner in one respect, which may be made up to the latter in the possession of some quality in which the former is deficient. One may have an established reputation in the neighborhood in which he lives for honesty and fair dealing; he may be surrounded by numerous and powerful friends; he may enjoy in an eminent degree the confidence of his fellow citizens; he may possess wisdom and sagacity in directing the general management of his affairs. Another, though destitute of some of these advantages, may nevertheless be a valuable partner, for his activity in business, his knowledge and skill as an accountant, or his tact as a salesman. These things are all taken into the account by the parties when they form a connection. They deal with each other, in making the bargain, at arm's length, and each trusts to his own wisdom to secure as many of the advantages resulting from the copartnership as he can. A bill in equity could not be sustained by a partner, at the close of the concern, to compel a copartner to make up deficiencies arising from his want of business talent. I apprehend nothing short of a breach of good faith, amounting to fraud, will justify the interference of the court in estimating the value of a partner's services to the firm." Although a partner takes full charge of

[51] In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206, citing Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677.

[52] Caldwell v. Leiber, 7 Paige Ch. (N. Y.) 483.

the affairs and business of the partnership, his managerial services will not per se increase the share of the profits to which he will otherwise be entitled.[53] There must be an agreement for compensation before he can recover[54] although he performs all the services for the firm.[55]

§ 352. Compensation for services after dissolution.—The rule against allowing compensation for services in absence of agreement undoubtedly holds good in general not only during the actual existence of the partnership relation but until, following dissolution, the business is wound up and the final word said.[56]

[53] Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Evans v. Warner, 20 App. Div. 230, 47 N. Y. S. 16; Weaver v. Upton, 29 N. Car. 458; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160.

[54] Pierce v. Scott, 37 Ark. 308; Peck v. Alexander, 40 Colo. 392, 91 Pac. 38; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3 (affg. 29 Ill. App. 358); Cook v. Phillips, 16 Ill. App. 446; Atherton v. Cochran, 11 Ky. L. 185, 9 S. W. 519, 11 S. W. 301; Myers v. Kirby, 9 Ohio Dec. 297; Miller v. Mackay, 31 Beav. 77, 34 Beav. 295. See Mattingly v. Stone, 18 Ky. L. 187, 35 S. W. 921.

[55] Cole v. Cole (Ark.), 177 S. W. 915.

[56] "One partner can not be allowed compensation for extra service in behalf of the firm, either before or after its dissolution, without an express stipulation to that effect." Berry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742. See also Consoul v. Cummings, 24 App. D. C. 36; Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; McElroy v. Whitney, 12 Idaho 512, 88 Pac. 349; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; In re Curlee, 118 La. 563, 43 So. 165; Inglis v. Floyd, 33 Mo. App. 565; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167; Clausen v. Puvogel, 114 App. Div. (N. Y.) 455, 100 N. Y. S. 49; Cameron v. Francisco, 26 Ohio St. 190; Stockdale v. Maginn, 207 Pa. 226, 56 Atl. 439; Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833; Liggett v. Hamilton, 24 Can. Sup. Ct. 665; Burden v. Burden, 1 Ves. & B. 170, 12 R. R. 210; Stocken v. Dawson, 6 Beav. 371. See further Kimball v. Lincoln, 5 Ill. App. 316; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840; Anderson v. Taylor, 37 N. Car. 420, 38 Am. Dec. 689; Philips v. Turner, 22 N. Car. 123; Buford v. Neely, 17 N. Car. 481; Stockdale v. Maginn, 207 Pa. 226, 56 Atl. 439; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293;

"The rule of law is well settled by the weight of authorities, that neither partner of a dissolved firm is entitled to compensation for services rendered in winding up the partnership affairs unless it is expressly agreed otherwise, or can be fairly implied from the circumstances. It seems, however, that the rule should not be extended beyond the requirement of merely winding up the partnership affairs, by collecting its outstanding claims, paying debts, and distributing the surplus among the members, and that when it appears that time, skill and labor have been expended by a partner in the continuance of the partnership business, which inure to the general benefit, he ought to receive, from the profits from his skill and labor, a reasonable compensation, varying according to the nature of the business, the difficulties and results of the undertaking and its necessity or desirability. While few cases are found which directly support this view, it seems to be founded upon the plainest principles of equity and justice, especially when applied to partnerships among professional men,

Dodson v. Dodson, 6 Heisk. (Tenn.) 110; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Piper v. Smith, 1 Head (Tenn.) 93. And compare Griggs v. Clark, 23 Cal. 427; Van Duzer v. McMillan, 37 Ga. 299; Hutchinson v. Onderdonk, 2 Halst. Ch. (N. J.) 277, 300. Any attempt, however, to put this proposition in the form of a general statement has been disapproved in Thayer v. Badger, 171 Mass. 279, 50 N. E. 541, in which Holmes, J., delivering the opinion of the court, says: "It is true, no doubt, that there is a disinclination to allow pay to a surviving partner for winding up (Dunlap v. Watson, 124 Mass. 305), but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules. Turnbull v. Pomeroy, 140 Mass. 117, 118, 3 N. E. 15; Robinson v. Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. 299." See further Hite v. Hite's Exrs., 1 B. Mon. (Ky.) 177; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Schenkl v. Dana, 118 Mass. 236; Royster v. Johnson, 73 N. Car. 474; In re Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Bradley v. Chamberlin, 16 Vt. 613. In the case of Shumard v. Gano, 8 Ohio C. D. 370, 18 Ohio C. Ct. 871, two persons had agreed to form a partnership, but, through lack of compliance by one of them, the partnership was never launched. And it was held that the delinquent party could not recover from his cocontractor for services rendered by him during the inchoate agreement to form a partnership, there having been no express promise on the part of the defendant to pay for such services.

where the profits are almost wholly the result of professional skill and labor."[57]

§ 353. **Compensation to surviving partner.**—Under the Uniform Partnership Act, "a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.[58] This is contrary to the general rule followed by the weight of American authority, although there is not unanimity on this point. "But where the partnership is dissolved by death of one of the partners, or by a decree of the court * * * the rule is not so well settled. Indeed, there seems to be a diversity of decisions in relation thereto. After all, the holding in any given case must at last turn upon the facts of that particular case. * * * The greater weight of authority sustains the proposition that, in cases wherein the partnership is dissolved by death of one of the partners or operation of law, the partner who winds up the business would not be entitled to compensation in the absence of an agreement to that effect. Where such partner so winding up the partnership business enters into new business, and assumes obligations and risks not imposed upon him by the partnership agreement, and such new business is successful, and the other partner, or, if he be dead, his representatives, elect to share in the profits of the new business, the partner so conducting such new business under the partnership name might properly be allowed compensation for his services."[59] It was said in one leading case:[60] "At the for-

[57] Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167.

[58] Uniform Partnership Act, § 18(f).

[59] Ruggles v. Buckley, 175 Fed. 57, 99 C. C. A. 73, 27 L. R. A. (N. S.) 541. See also Kimball v. Lincoln, 99 Ill. 578 (affg. 5 Ill. App. 316); Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Coakley v. Hazelwood, 21 Ky. L. 40, 49 S. W. 1067; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505, 63 Mich. 355, 29 N. W. 867; Slater v. Slater, 78 App. Div. 449, 80 N. Y. S. 363 (mod. 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605); Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677. Contra: Royster v. Johnson, 73 N. Car. 474. Compare Sangsten v. Hack, 52 Md. 173.

[60] Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677.

mation of a partnership, its dissolution by death is rarely contemplated. It is an unwelcome subject; for no man who enters on a speculation can bear to think he may not live to finish it. Hence the contract is usually framed for operations during the proposed period; and when the parties anticipate the expiration of it, they dispose of the unfinished business by a new arrangement. Consequently, in articles or a parol contract of partnership, there is seldom, if ever, an express provision for a case like the present; and where compensation is not allowed a surviving partner by a commercial custom, the contract, based on the law of partnership, binds him by an implied covenant or promise to settle the accounts, pay the debts, and hand over a proportionate part of the capital and profits as his proper business. As each partner is clothed with all the power of the firm, each is burdened with all the duties of it; and when one of them dies, this power and these duties devolve on the survivor as the representative of the firm, or rather as the firm itself. Now the difficulty is to conceive how a party can entitle himself to a reward for doing what the law and his contract had bound him to do. * * * At first view, it might seem unjust that a co-operator should contribute more than his share to the success of an enterprise without remuneration for the excess; but his share depends on the nature of the bargain. By the contract of association, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of values; for services to the firm can not, from their very nature, be estimated and equalized by compensation of differences. They are inappreciable, and unsusceptible of specific charge. A partner could not keep an account of every hoop or nail driven by him; and if this be the nature of services to the firm before dissolution, it is the nature of services to the firm after it. A partner might as well pretend to charge for doing his partner's duties during sickness or temporary insanity, which does not necessarily work a dissolution of the partnership, as to charge for doing what his dead partner might have possibly done had

he lived. The difference is, that the disability is temporary in the one case and perpetual in the other; but the legal consequences of it between the partners are the same." Generally, a surviving partner who continues the business instead of winding it up can not receive compensation for his services unless there is an agreement.[61] There are some cases to the contrary, however, especially in England.[62] The general rule that there is no right to compensation in the absence of agreement applies when a surviving partner carries on the business in conformity with a testamentary direction of the deceased partner,[63] although with the consent of the heirs or executor compensation is sometimes allowed.[64] The general rule applies when the surviving partner is the deceased partner's executor.[65] Consent of the next of kin[66] or provision in the deceased partner's will, may authorize the payment for services.[67] Still the express right of a partner

[61] Young v. Scovil, 99 Iowa 177, 68 N. W. 670; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Schenkl v. Dana, 118 Mass. 236; In re Taft, 55 Hun 603, 8 N. Y. S. 282, 28 N. Y. St. 315; Buford v. Neely, 17 N. Car. 481; Cameron v. Francisco, 26 Ohio St. 190; Newell v. Humphrey, 37 Vt. 265.

[62] Brown v. De Tastet, Jacob 284. See criticism of this case in Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Cook v. Collingridge, Jacob 607, 1 L. J. (O. S.) Ch. 74, 23 R. R. 155, 767; Yates v. Finn, L. R. 13 Ch. Div. 839, 49 L. J. Ch. 188, 28 W. R. 387; Featherstonhaugh v. Turner, 25 Beav. 382, 28 L. J. Ch. 812; Griggs v. Clark, 23 Cal. 427; McElroy v. Whitney, 12 Idaho 512, 88 Pac. 349; Robinson v. Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. 299; Cameron v. Francisco, 26 Ohio St. 190.

[63] Tillotson v. Tillotson, 34 Conn. 335; Berry v. Folkes, 60 Miss. 576; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286.

[64] In re Bach, 12 N. Y. S. 712; Barber v. Murphy, 23 Ky. L. 286, 62 S. W. 894. Contra: Kimball v. Lincoln, 5 Ill. App. 316 (affd. 99 Ill. 578).

[65] Colgin v. Cummins, 1 Port. (Ala.) 148; Terrell v. Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. 258; Gregory v. Menefee, 83 Mo. 413; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; In re Harris, 4 Dem. (N. Y.) 463; Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49; Matter of Dummett, 38 Misc. (N. Y.) 477, 77 N. Y. S. 1118; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Dodson v. Dodson, 6 Heisk. (Tenn.) 110; In re Pickens Estate, 14 W. N. C. (Pa.) 407; Burden v. Burden, 1 Ves. & B. 170, 12 R. R. 210.

[66] Clausen v. Purvogel, 114 App. Div. 455, 100 N. Y. S. 49.

[67] Allen's Appeal, 125 Pa. St. 544, 17 Atl. 453.

to receive a certain salary during the time for which the partnership was created would seem to vest in him the right to receive compensation at the salary rate for such period as the business is continued after the expiration of its predetermined existence.[68] Sometimes a surviving partner is allowed compensation for extraordinary or unusual services, as upon an implied contract.[69] It has been said, as to compensation for a liquidating or surviving partner, that: "there may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor."[70] But other cases hold such partnerships no exception to the general rule.[71]

§ 354. Implied contract for compensation.—"The rule, that each partner must be assumed to render his services in the partnership business gratuitously, is not inflexible nor of universal application. It has its exceptions founded in wisdom and experience. Where it can be fairly and justly implied from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained.[72] "The partnership

[68] Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Gresham v. Harcourt (Tex. Civ. App.), 50 S. W. 1058. Contra: O'Neill v. Duff, 11 Phila. (Pa.) 244. But compare Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579.

[69] Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Hite v. Hite, 1 B. Mon. (Ky.) 177; Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647; Hanks v. Wilcox, 2 Hawaii 509.

[70] Denver v. Roane, 99 U. S. 355, 25 L. ed. 476. See also Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405; Lamb v. Wilson, 3 Nebr. (Unof.) 496, 92 N. W. 167; Sterne v. Goep, 20 Hun (N. Y.) 396 (affd. 84 N. Y. 641).

[71] Starr v. Case, 59 Iowa 491, 13 N. W. 645.

[72] Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. See also Mondamin Bank v. Burke (Iowa), 147 N. W. 148; Morris v. Griffin, 83 Iowa 327, 49 N. W. 846; Lassiter v. Jackman, 88 Ind. 118; Whitney v. Whitney, 27 Ky. L. 1197, 88 S. W. 311; Cramer v. Bachman, 68 Mo. 310; Folsom v. Marlette, 23 Nev. 459, 49 Pac. 39; Wisner v. Field, 11 N. Dak. 257,

may be of such a peculiar kind, and the arrangements and the course of dealing of the partners in regard to it may be such as pretty plainly to show an expectation and understanding, without an express agreement upon the subject, that certain services of a copartner should be paid for. Such cases, presenting unusual conditions, are exceptions to the general rule," however.[73] On more than one occasion it has been denied that a gross inequality in the service to the credit of the several partners creates the presumption of an agreement to compensate specifically for the superior services rendered.[74] But where one partner has full charge of the business and others have acquiesced and devoted their time to their own affairs, an agreement to compensate will be implied more readily than where all are giving equal attention to the business.[75] And a partner who is employed to render services which neither under the law nor the articles of association he is required to perform may recover compensation therefor on an implied agreement for the same.[76] Again a partner who gives his undivided services to the partnership business has been held entitled to extra compensation even without any agreement to that effect when his associate is employed by a third person on a salary from which the partnership derives no benefit.[77] So a partner who has supplied all the capital and has himself alone managed and controlled the firm affairs, under partnership articles requiring each member of the firm to give their services to the common business, is entitled to a salary in the form of a credit on final settlement.[78] And

91 N. W. 67; Main v. Flanagan, 9 Ore. 425; Lindsey v. Stranahan, 129 Pa. St. 635, 18 Atl. 524. See cases cited in note 45, § 350, on right to compensation for services.

[73] Hoag v. Alderman, 184 Mass. 217, 68 N. E. 199.

[74] McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Roach v. Perry, 16 Ill. 37; Lewis v. Moffett, 11 Ill. 392. See further Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Cook v. Phillips, 16 Ill. App. 446.

[75] Mondamin Bank v. Burke (Iowa), 147 N. W. 148.

[76] Levi v. Karrick, 13 Iowa 344. See cases cited in § 355, on services rendered in capacity other than partner.

[77] Morris v. Griffin, 83 Iowa 327, 49 N. W. 846.

[78] Mattingly v. Stone, 18 Ky. L. 187, 35 S. W. 921. See also, Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593.

yet where a partner is compelled through sickness to abandon the business in violation of the articles of partnership, it is held that his copartner will not thereby become entitled to compensation for his services.[79] So again it is not altogether clear in the absence of an express agreement defining the services to be performed by the several partners, that even the wilful inattention to business by a member of the firm which entails upon his copartners services otherwise unnecessary will entitle the latter or any one of them to any extraordinary share of the profits as such of the firm.[80]

§ 355. Compensation for services rendered in other capacity than partner.—A partner may recover compensation for services to the firm not required of him as a partner but rendered outside of that relation and in another capacity, usually such work as another must have been hired to perform had he not done it, such as acting as general clerk, where the other partners did not personally enter into the business,[81] or as agent

[79] MacDowell v. North, 24 Ind. App. 435, 55 N. E. 789. See also Heath v. Waters, 40 Mich. 457. Certain it is, that it does not require any formal adjudication to accept as a fact the proposition that a partner will not be able to charge the firm specifically for extra services devolved upon him by reason of the illness of his copartner. A partner is "bound to discharge his duties in relation to preserving and caring for the partnership estate without extra compensation, duties which the common law implies are incident to the contract of copartnership — duties which remain in the absence or disability of the copartner, whether occasioned by causes of a temporary nature, as, for instance, sickness, or a permanent nature, as, for, instance, death." Scudder v. Ames, 89 Mo. 496, 14 S. W. 525. "So long as a partnership continues, the sickness or inability of a partner is one of the risks incidental to the business, and works no forfeiture or deduction." Heath v. Waters, 40 Mich. 457.

[80] Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare Lindley Partnership, *381; Morris v. Griffin, 83 Iowa 327, 49 N. W. 846; Clement v. Ditterline's Admr., 11 Ky. L. 294, 11 S. W. 658; Airey v. Borham, 29 Beav. 620, 4 L. T. 391.

[81] Godfrey v. White, 43 Mich. 171, 5 N. W. 243.

for a special purpose[82] or selling goods.[83] And it seems that one partner may recover the value of his services from his co-partner when the same have been performed for the latter individually and not as a member of the firm, and there exists no agreement that such liability shall not attach.[84] Where the minor children of a managing partner are, with the consent of the other member of the firm, employed in the partnership business, it has been held that their father is entitled to be compensated for their services.[85] If there is an express or implied agreement, one may recover from another for services rendered in contemplation of a partnership which was not launched,[86] or where one contemplated partner was engaged specially to investigate the property as to which a partnership was afterward formed,[87] or a prospective partner rendered services and was afterward excluded from the partnership.[88]

§ 356. Partner failing or refusing to perform services—Misconduct.—If one partner refuses without good cause to perform the services to which he has agreed, the other will usually be given an allowance therefor, or a deduction will be made from the share of the partner who did not perform his agreed service.[89] And it has been held that where a partner was prevented by sickness from rendering to the firm agreed services not of a personal character, he was chargeable with the

[82] Duff v. Maguire, 107 Mass. 87; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431; Butner v. Lemly, 58 N. Car. 148; Philips v. Turner, 22 N. Car. 123.

[83] Lewis v. Moffett, 11 Ill. 392; Shirk's Appeal, 3 Brewst. (Pa.) 119.

[84] Lell v. Hardesty, 23 Ky. L. 2073, 66 S. W. 643. And compare Williams v. Knibbs, 213 Mass. 534, 100 N. E. 666.

[85] Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467. See also Zimmerman v. Huber, 29 Ala. 379.

[86] Waugh v. Eden, 12 Colo. App. 158, 54 Pac. 853; Lane v. Roche, Riley Eq. (S. Car.) 215.

[87] Duff v. Maguire, 107 Mass. 87.

[88] Williams v. McKee, 13 Ky. L. (abstract) 143; White v. Rodemann, 44 App. Div. 503, 60 N. Y. S. 971. But compare Gullich v. Alford, 61 Miss. 224; Dunlap v. Watson, 124 Mass. 305.

[89] Stegman v. Berryhill, 72 Mo. 307; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Caldwell v. Leiber, 7 Paige Ch. (N. Y.) 483; Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206.

amount paid to other persons who did the work.[90] So in some cases where, on account of a default of the other partner or partners, in attending to their duties relative to the firm business, he is forced to assume a greater burden than he would otherwise have done, the active partner may receive compensation for such extra services.[91] For example: If one partner goes out of the country and leaves the other to wind up the affairs of the partnership, the latter is entitled to such an amount as would reasonably compensate him for the services so performed.[92] The rule just stated is, however, it would seem, only applied in exceptional cases, and our courts have held that even though one partner has worked continuously at the partnership business for many years, while the others have given it little, if any, attention, in the absence of any agreement therefor, the active partner can not claim compensation for the services so rendered.[93] So, also, where a partnership agreement is rescinded on the ground of fraud, the one who was fraudulently induced to engage in the business may be entitled in addition to his contributions thereto with interest, to reasonable compensation for his services in attending to the same.[94] A partner by fraud or misconduct may forfeit his right to compensation, although it has been provided for by express contract.[95] This rule does not apply where both partners were negligent.[96] Nor is a partner who contracted to give his entire time to the business, entitled to compensation for a portion of the time during which

[90] Hart v. Myers, 25 Abb. N. Cas. 478, 12 N. Y. S. 140 (affd. 59 Hun 420, 13 N. Y. S. 388, 36 N. Y. St. 641).

[91] Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647.

[92] Clement v. Ditterline, 11 Ky. 294, 11 S. W. 658.

[93] Strattan v. Tabb, 8 Ill. App. 225. See Forrer v. Forrer, 29 Grat. (Va.) 134.

[94] Caplen v. Cox, 42 Tex. Civ. App. 297, 92 S. W. 1048, citing Richards v. Todd, 127 Mass. 167.

[95] Blair v. Shaeffer, 33 Fed. 218; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Young v. Berryman, N. B. Eq. Cas. 110.

[96] Morris v. Griffin, 83 Iowa 327, 49 N. W. 846.

he was otherwise employed.[97] One partner who excludes the others from the business is not entitled to compensation.[98]

§ 357. Repayment of capital.—In a consideration of the right of a partner to have his capital repaid to him upon dissolution of the firm, the subject must be approached from several angles. In a leading Massachusetts case[99] Chief Justice Gray, in his opinion, quoting from Kent's Commentaries, recognizes the different cases, where there is a definite stipulation and where there is none, in the following words: "In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital and the other nothing but his labor or services." Further quoting from Story on Partnership, he draws a further distinction as to general partnerships and partnerships for a single transaction, as follows: "If, as is not infrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual to whom it originally belonged, any loss or destruction of it falls upon him as the owner and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who contributed it; such payment can not, indeed, be demanded during the continuance of the partnership, nor are the contributors in the absence of agreement or usage entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient

[97] Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053.

[98] Frazier v. Frazier, 77 Va. 775.

[99] Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311.

to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership."[2] So if there is no contrary agreement,[3] and the capital has passed to the firm, it is a debt owing to the contributing partner by the firm on dissolution, which is to be paid after debts and liabilities to outsiders, and advances, loans and indemnities to partners, that is, after all other firm debts, to outsiders and to partners, have been paid.[4] If the firm assets are insufficient to pay all the capital he is paid in ratable proportion to his contribution.[5] The Uniform Partnership Act provides:[5a] "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners are satisfied; and must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share

[2] Bradbury v. Smith, 21 Maine 117; Julio v. Ingalls, 1 Allen (Mass.) 41; Taft v. Schwamb, 80 Ill. 289; Barfield v. Longborough, L. R. 8 Ch. 1, 42 L. J. Ch. 179, 27 L. T. 499, 21 W. R. 86; In re Anglesea Colliery Co., L. R. 2 Eq. 379; Nowell v. Nowell, L. R. 7 Eq. 538; In re Hodges Distillery Co., L. R. 6 Ch. 51; 1 Lindley Partnership (3d ed.) pp. 696, 827.

[3] Groth v. Kersting, 23 Colo. 213, 47 Pac. 393; Scutt v. Robertson, 127 Ill. 135, 19 N. E. 851, 17 N. E. 14; Burger v. Robinson, 81 Misc. (N. Y.) 678, 143 N. Y. S. 530; Wood v. Scoles, L. R. 1 Ch. 369, 35 L. J. Ch. 547, 12 Jur. (N. S.) 555, 14 W. R. 621.

[4] Bullock v. Ashley, 90 Ill. 102; Jackson v. Crapp, 32 Ind. 422; Frederick v. Cooper, 3 Iowa 171; Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260; Thomas v. Winchester Bank, 105 Ky. 694, 49 S. W. 539, 20 Ky. L. 1502; Frigerio v. Crottes, 20 La. Ann. 351; Levingston v. Blanchard, 130 Mass. 341; Jones v. Butler, 87 N. Y. 613; Buie v. Kennedy, 164 N. Car. 290, 80 S. E. 445; Rowland v. Miller, 7 Phila. (Pa.) 362; In re Hall, 32 R. I. 424 79 Atl. 966; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227; Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686; Gore v. Vines, 72 W. Va. 783, 79 S. E. 820; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208; Hall v. Antrobus, 44 N. S. 96; Cameron v. Peters, 8 Ont. W. R. 359.

[5] Capitol Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Hasbrouck v. Childs, 16 N. Y. Super. Ct. 105; Kennedy v. Hill, 89 S. Car. 462, 71 S. E. 974. Compare Brewer v. Johnson, 87 Ark. 641, 112 S. W. 364. If one partner contributes in excess of the agreed amount it has been held this excess should be repaid first and the remaining assets divided equally. Chamberlain v. Sawyers, 17 Ky. L. 716, 32 S. W. 495.

[5a] Uniform Partnership Act, § 18(a).

in the profits." The right to a repayment of capital may be lost by agreement on consideration[6] or misconduct.[7] It is readily seen by the above that still another element sometimes creeps in; namely, whether or not the property used by the firm is itself turned over to the partnership, or simply the use of it. To summarize the above briefly, it may be stated that in case there is a contract covering the question, it must govern. Where there is no contract governing, and the property is simply used by the firm, but the ownership is retained by one partner, there is no right to repayment by reason of the partnership itself. In this latter case, it may perhaps be said that the property is not strictly capital. If the property does become the property of the firm, then there is a right to repayment from the firm, in case of loss of the capital, the same, and in the same proportions, as profits or other losses are shared, as to each partner.

§ 358. Repayment of advances.—The question of what is an advancement properly suggests itself at this point. As a matter of fact, it is often difficult to distinguish whether property turned over to the firm by a partner, for its use, is in the nature of a contribution to the capital, or as an advancement as a loan. If the property was turned over to the firm, and as a consideration therefor the partner surrendering it became the owner of a share in the partnership, whether it be his original entrance or not, it can only be considered a contribution to the capital, and not an advancement. If, on the contrary, he simply allows the firm the use of the money or other property, and does not take the absolute ownership of an interest in the firm by reason thereof, it is then considered a loan or advancement, and, as a general rule, is to be repaid, as was said in a Nevada case,[8] which quotes from Lindley on Partnership, as follows: "An advance by a partner to a firm is not treated as an increase

[6] Kibby v. Kimball, 63 Iowa 665, 19 N. W. 825; Neudecker v. Kohlberg, 3 Daly (N. Y.) 407; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Smiley v. Smiley, 112 Va. 490, 71 S. E. 532, Ann. Cas. 1913 B, 1159n.

[7] Escallier v. Baines, 40 Wash. 176, 82 Pac. 181.

[8] Folsom v. Marlette, 23 Nev. 459,

of his capital, but rather as a loan, on which interest ought to be paid; and, by usage, interest is payable on money bona fide advanced by one partner for partnership purposes, at least when the advance is made with the knowledge of the other partners." The court, continuing, approves the quotation as correct beyond question. In a Pennsylvania case[9] the same reasoning is followed. In this case one party furnished all the capital, with the agreement that in case of loss he should only be liable to a certain stipulated amount, and should be reimbursed by the others, and the agreement was upheld by the court as joint and several liability. This case differed slightly from the preceding one in that it was not a partnership liability to repay the advancement, but an individual one; however, in a general way it is in accordance with the general rule that in the absence of agreement, which will determine rights as to advancements,[10] each partner is a creditor of the firm as to money loaned it or personal obligations incurred in its business, or for purposes beneficial to the partnership, and has a right to repayment after the debts of the firm to outsiders have been met.[11] The Uniform

49 Pac. 39. See also Baker v. Mayo, 129 Mass. 517; Berry v. Folkes, 60 Miss. 576; Morris v. Allen, 14 N. J. Eq. 44; Collender v. Phelan, 79 N. Y. 366.

[9] Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[10] Von Schmidt v. Von Schmidt, 115 Cal. 239, 46 Pac. 1056; Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874; Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286; Looh v. Bailey (Tex. Civ. App.), 164 S. W. 407.

[11] Nichol v. Stewart, 36 Ark. 612; Silveira v. Reese, 138 Cal. xix, 71 Pac. 515; Keaton v. Mayo, 71 Ga. 649; Topping v. Paddock, 92 Ill. 92; Stevens v. Lunt, 19 Maine 70; Williams v. Henshaw, 12 Pick. (Mass.) 378, 23 Am. Dec. 614; Harrison v. Dewey, 46 Mich. 173, 9 N. W. 152; Lamb v. Rowan, 83 Miss. 45, 33 So. 427, 690; Finney v. Brant, 19 Mo. 42; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Sells v. Hubbell, 2 Johns. Ch. (N. Y.) 394; Sattler v. Sauer, 28 Pitts. Leg. J. (N. S.) 143; Wilson v. Wilson, 74 S. Car. 30, 54 S. E. 227; Martin v. Taylor (Tex. Civ. App.), 141 S. W. 1009; Maitland v. Purdy, 49 Wash. 575, 96 Pac. 154; Green v. Stacy, 90 Wis. 46, 62 N. W. 627; Burdon v. Barkus, 4 DeG., F. & J. 42, 8 Jur. (N. S.) 656; Wright v. Hunter, 5 Ves. 792; Sanders v. Herndon, 110 S. W. 862, 33 Ky. L. 669. Compare Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423; Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W.

Partnership Act provides for the repayment of advances.[12] If the funds are insufficient to repay the advance, the partner making the advance must share the loss, unless his loss is limited by agreement.[13]

§ 359. Right of partner to interest—In general.—Owing to the difference of opinion among the courts, any discussion of the allowance of interest in taking partnership accounts must descend almost to the point of being a mere digest of cases.[14] Of course, whenever a partner demanding interest can point either to an express or an implied agreement therefor, his account will in general receive credit in consonance therewith.[15]

704; Whitney v. Whitney, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. 2465; Mason v. Gibson, 73 N. H. 190, 60 Atl. 96; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Shamokin Banking Co. v. Focht, 21 Pa. Dist. 551.

[12] Uniform Partnership Act, § 18 (a), quoted in § 357 ante.

[13] See cases cited in note 11, ante; Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018; Stark v. Howcott, 118 La. 489, 43 So. 61; Raymond v. Putnam, 44 N. H. 160.

[14] Lindley Partnership, *389; Buckingham v. Ludlum, 29 N. J. Eq. 345; Johnson v. Hartshorne, 52 N. Y. 173; In re Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382. See note, on right of partner to interest on capital or other funds due to him from firm. Ann. Cas. 1913 A, 173. It was said in a note on "Allowance of interest in favor or against a partner during the continuance of the firm," 35 L. R. A. (N. S.) 220, that: "There are, broadly speaking, three grounds upon which interest is allowable: (1) As the fruit of a contractual provision therefor, either express, or implied from the situation of the parties or mercantile usage; (2) as damages for the detention of a sum of money after it has become due; (3) as an equitable equivalent for the use of money fraudulently withheld from its rightful owner. There is, therefore, no basis for the allowance of interest, as between partners, on either capital, advances, balances between them, or indebtedness to the firm, unless the circumstances of the case bring it within one or another of these rules."

[15] "Where one partner furnishes all or more than his share of the capital of the business, he may contract for any rate of interest on the surplus of capital so furnished by him, to be paid out of the profits of the business, as preferred profits. If there are no profits, or the business fails, he gets no interest and loses his capital. It is for this additional risk that he is permitted to charge and receive from the business as a preferred profit, in the event it is earned, a return exceeding the legal rate of interest upon the capital so advanced." Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154. See further Ex parte Chippendale, 4 DeG., M. & G.

Apparently, even this rule, which has been stated so broadly, is not absolute, there being certain cases which seem to demand its qualification.[16]

§ 360. Right to interest on capital.—If in the partnership agreement it is stipulated that the partners will be allowed interest on the capital invested, such agreement will be enforced.[17]

19, 18 Jur. 712; Pond v. Clark, 24 Conn. 370; Prentice v. Elliott, 72 Ga. 154; Taft v. Schwamb, 80 Ill. 289; Doyle v. Duckworth, 149 Iowa 623, 129 N. W. 59; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Pratt v. McHatton, 11 La. Ann. 260; Juilliard v. Orem's Exrs., 70 Maine 465, 17 Atl. 333; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Montague v. Hayes, 10 Gray (Mass.) 609; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Morris v. Allen, 14 N. J. Eq. 44; Hayne v. Sealy, 71 App. Div. (N. Y.) 418, 75 N. Y. S. 907; Matter of Laney, 50 Hun (N. Y.) 15, 18 N. Y. St. 463, 2 N. Y. S. 443 (affd. 119 N. Y. 607, 23 N. E. 1143); Bullock v. Bemis, 51 Hun (N. Y.) 637, 20 N. Y. St. 836, 3 N. Y. S. 309; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; Moore v. Westbrook, 156 N. Car. 482, 72 S. E. 842, Ann. Cas. 1913 A, 168n; Wayne v. Hinkle, 9 Ohio Dec. 389, 12 Wkly. L. Bul. 282 (affd. 20 Wkly. L. Bul. 19); Cunningham v. Green, 23 Ohio St. 296; Piper v. Smith, 1 Head (Tenn.) 93; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare Barfield v. Loughborough, L. R. 8 Ch. 1, 42 L. J. Ch. 179, 27 L. T. 499, 21 W. R. 86; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Lockwood v. Roberts, 171 Mass. 109, 50 N. E. 517; Robinson v. Simmons, 156 Mass. 123, 30 N. E. 362; Bradley v. Brigham, 137 Mass. 545; Johnson v. Hartshorne, 52 N. Y. 173; Jones v. Jones, 36 N. Car. 332.

[16] "In the absence of an express agreement, partners are not ordinarily entitled to interest against each other." Ames v. Ames, 113 Minn. 137, 129 N. W. 156. See further Osborn v. Gheen, 5 Mackey (D. C.) 189 (affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072); Moss v. McCall, 75 Ill. 190; Taylor v. Snell, 79 Ill. App. 462 (affd. 182 Ill. 473, 55 N. E. 545); Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Sanford v. Barney, 50 Hun (N. Y.) 108, 19 N. Y. St. 16, 4 N. Y. S. 500; In re James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. 774; In re Brown's Appeal, 89 Pa. St. 139.

[17] Ruggles v. Buckley, 86 C. C. A. 154, 158 Fed. 950; Doyle v. Duckworth, 149 Iowa 623, 129 N. W. 59; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Montague v. Hayes, 10 Gray (Mass.) 609; Juilliard v. Orem, 70 Maine 465, 17 Atl. 333; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Oppe v. Webendorfer, 43 Hun (N. Y.) 640, 7 N. Y. St. 283;

As a rule, interest is not allowed on unwithdrawn profits, unless it is so provided by contract,[18] nor will such profits be considered as capital where the agreement is to pay interest on capital.[19] Ordinarily when it has not been otherwise agreed, capital contributed is noninterest-bearing, at least prior to dissolution of the partnership relation.[20] "Each partner is presumed to look to his share of profits for his compensation and not to

Hayne v. Sealy, 71 App. Div. 418, 75 N. Y. S. 907; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Piper v. Smith, 1 Head (Tenn.) 93. Interest may be allowed on capital at more than the legal rate. Cunningham v. Green, 23 Ohio St. 296; Ruggles v. Buckley, 86 C. C. A. 154, 158 Fed. 950. If each is to receive interest, it is proper to allow it only on the excess contributed by one over the other. Scheuer v. Berringer, 102 Ala. 216, 14 So. 640.

[18] Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Gilman v. Vaughan, 44 Wis. 646.

[19] Tutt v. Land, 50 Ga. 339; Dinham v. Bradford, L. R. 5 Ch. 519. If one partner receives interest on capital, the other should receive it also on salary or profits which he left in the firm. Keiley v. Turner, 81 Md. 269, 31 Atl. 700.

[20] "The rule applicable to general partnerships is that a partner is not entitled to interest on capital which he contributes to the firm, although his contribution be greatly in excess of that of his copartners, unless they have agreed that he may have interest." Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474. See further, Cooke v. Benbow, 3 DeG., J. & S. 1, 6 New Rep. 135; Rishton v. Grissell, L. R. 5 Eq. 326; Jardine v. Hope, 19 Grant Ch. (U. C.) 76; Osborn v. Gheen, 5 Mackey (D. C.) 189 (affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072); Desha v. Smith, 20 Ala. 747; Carpenter v. Hathaway, 87 Cal. 434, 25 Pac. 549; Tirrell v. Jones, 39 Cal. 655; Day v. Lockwood, 24 Conn. 185; Topping v. Paddock, 92 Ill. 92; Doyle v. Duckworth, 149 Iowa 623, 129 N. W. 59; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44 S. W. 653; Ashbrook v. Ashbrook, 16 Ky. L. 593, 28 S. W. 660; Burgher v. Burgher, 12 Ky. L. (abstract) 95; Adkinson v. Dent, 5 Ky. L. (abstract) 118; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Baker v. Mayo, 129 Mass. 517; Clark v. Pierce, 74 Mich. 638, 42 N. W. 357; Ames v. Ames, 113 Minn. 137, 129 N. W. 156; St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Clark v. Worden, 10 Nebr. 87, 4 N. W. 413; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82; Sanford v. Barney, 50 Hun (N. Y.) 108, 4 N. Y. S. 500, 19 N. Y. St. 16; Moore v. Westbrook, 156 N. Car. 482, 72 S. E. 842, Ann. Cas. 1913 A, 168; Holden v. Peace, 39 N. Car. 223, 45 Am. Dec. 514; Brenner v. Carter, 10 Pa. Dist. Ct. 457; Stokes v. Hodges, 11 Rich. Eq. (S. Car.) 135; Frierson v. Morrow (Tenn.), 48 S. W. 245; Hatzfeld v. Walsh, 55 Tex. Civ. App. 573, 120 S.

count upon interest as making any element of his profits."[21] By the Uniform Partnership Act, "A partner shall receive interest on the capital contributed by him only from the date when repayment should be made."[22] Further, the weight, unaffected by prior agreement, to be attached to the demand for interest of a partner who has done that which his copartner has not,—namely, contributed the share of capital assigned to him—is a point on which the decisions do not speak with united voice.[23] However this may be, it will no doubt be proper to penalize an offending partner by debiting him with interest upon the contribution to the capital which for one reason or another he did not make.[24] On the other hand the allowance of interest can not apparently be used as a tool to smooth off the sharp edges of inequality in the matter of the different shares placed to the credit of the firm capital, whatever their nature may have been, unless there has been an agreement to that effect.[25] Further, it seems that a partner who brings in tangible property as capital can not obtain equalization of his contribution and that of his copartner, whose prescribed offering to the common fund consisted of time and labor only by the interest method, as of right.[26] If there is a contract for interest upon contributions

W. 525; Smith v. Putnam, 107 Wis. 155, 82 N. Y. 1077, 83 N. W. 288.

[21] Osborn v. Gheen, 5 Mackey (D. C.) 189 (affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072).

[22] Uniform Partnership Act, § 18 (d).

[23] Ligare v. Peacock, 109 Ill. 94; Montague v. Hayes, 10 Gray (Mass.) 609; Clark v. Warden, 10 Nebr. 87, 4 N. W. 413; Hartman v. Woehr, 18 N. J. Eq. 383; Stokes v. Hodges, 11 Rich. Eq. (S. Car.) 135; Hill v. King, 3 DeG., J. & S. 418, 1 N. R. 161.

[24] Reynolds v. Mardis, 17 Ala. 32; Turnipseed v. Goodwin, 9 Ala. 372; Ligare v. Peacock, 109 Ill. 94; Krapp v. Aderholdt, 42 Kans. 247, 21 Pac. 1063; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Pratt v. McHatton, 11 La. Ann. 260; Hartman v. Woehr, 18 N. J. Eq. 383; In re Laney, 50 Hun (N. Y.) 15, 18 N. Y. St. 463, 2 N. Y. S. 443 (affd. 119 N. Y. 607, 23 N. E. 1143); Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. Contra: Stokes v. Hodges, 11 Rich. Eq. (S. Car.) 135; Wilson v. McCarty, 25 Grant Ch. (U. C.) 152.

[25] Desha v. Smith, 20 Ala. 747; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Ames v. Ames, 113 Minn. 137, 129 N. W. 156.

[26] Tirrell v. Jones, 39 Cal. 655; Tutt v. Land, 50 Ga. 339; O'Bryan v. Brumback, 11 Ky. L. (abstract) 405; Berry v. Folkes, 60 Miss. 576; San-

it is assumed that interest will cease upon dissolution of the partnership by agreement.[27]

§ 361. Right to interest on advances.—By the Uniform Partnership Act, "A partner who, in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."[28] But on looking to the cases not under the act, when the question of interest on advances comes under consideration, a prima facie conflict at once intrudes itself,[29] in some instances it having been indicated that

ford v. Barney, 50 Hun (N. Y.) 108, 19 N. Y. St. 16, 4 N. Y. S. 500; Lewis v. Whitehall Lumber Co., 47 Hun (N. Y.) 637, 14 N. Y. St. 302; Jackson v. Johnson, 11 Hun (N. Y.) 509 (revd. 74 N. Y. 607); Rodgers v. Clement, 15 App. Div. (N. Y.) 561, 44 N. Y. S. 516; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474; Stevens v. Cook, 5 Jur. (N. S.) 1415; Jardine v. Hope, 19 Grant Ch. (U. C.) 76.

[27] Mosapp v. Stevens, 142 N. Y. S. 690, 158 App. Div. 874.

[28] Uniform Partnership Act, § 18(c).

[29] An attempt has been made in a note in 35 L. R. A. (N. S.) 220, appended to Kilworth v. Ice, 84 Kans. 458, 114 Pac. 857, to explain this seeming discord among authorities. In this note at page 223 it is said, citing Buckingham v. Ludlum, 29 N. J. Eq. 345, and Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342: "The apparent conflict between the decisions as to the allowance of interest to a partner on his advances is due to a failure on the part of some of the courts to state whether they refer to advances of money to be employed as capital, or to advances by way of loan. In the one case, as the partner is considered as looking to the profits for compensation, there is no basis upon which an agreement on the part of the firm to pay interest may be implied; while, on the other hand, if it is shown that the advance was not intended as other than a loan, such an agreement may be implied from mercantile usage." When capital itself can ordinarily be regarded as something altogether different from a loan to the firm, the reasoning here employed may be accepted as logical. Until then this explanation must be regarded as being based upon a false distinction—not upon any practical difference. It may be as is stated that courts in allowing or disallowing interest on advances, have this attempted distinction in mind. Even though this be so, it is undoubtedly true that the same courts could not themselves with invariable exactness discover when an advance was intended as a "loan" and when as a contribution to an agreed increased capital. Hence it seems that until a more practical suggestion is offered, no rule, clearly defined, can be laid down whereby to determine when advances will and when they will not bear interest.

such advances possess intrinsically the interest-drawing quality,[30] —in others, that they do not.[31] A comparatively recent New York case states the rule in the following language: "Where the share of the several partners in a partnership venture depends upon the capital furnished by them, respectively, it is very

[30] "As between partners, there is no doubt that a partner who makes advances for partnership purposes beyond the amount of his agreed contribution is entitled to collect interest thereon, at the customary legal rate, even in the absence of any express agreement therefor with his copartners." Mack v. Engel, 165 Mich. 540, 131 N. W. 92. See further Ex parte Chippendale, 4 DeG., M. & G. 19, 18 Jur. 710; Osborn v. Gheen, 5 Mackey (D. C.) 189 (affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072); Reynolds v. Mardis, 17 Ala. 32; Turnipseed v. Goodwin, 9 Ala. 372; McMillan v. James, 105 Ill. 194; Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045; Boreing v. Wilson, 128 Ky. 570, 108 S. W. 914; Wolf v. Levi, 17 Ky. L. 1024, 33 S. W. 418; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Baker v. Mayo, 129 Mass. 517; Mack v. Engel, 165 Mich. 540, 131 N. W. 92; Berry v. Folkes, 60 Miss. 576; Coddington v. Idell, 29 N. J. Eq. 504; Lloyd v. Carrier, 2 Lans. (N. Y.) 364; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587; Evans v. Weatherhead, 24 R. I. 394, 53 Atl. 286; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474; In re Cleverdon, 4 Ont. App. 185; Davidson v. Thirkell, 3 Grant Ch. (U. C.) 330; Consaul v. Cummings, 24 App. D. C. 36; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Jordan v. Wilson, 64 Ill. App. 665; Folsom v. Marlette, 23 Nev. 459, 49 Pac. 39; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82; Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474. And compare Hart v. Clarke, 3 DeG., M. & G. 232, 24 L. J. Ch. 137, 3 Eq. Rep. 264, 3 Week. Rep. 147; Holloway v. Turner, 61 Md. 217; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Brown v. Schackelford, 53 Mo. 122.

[31] Prentice v. Elliott, 72 Ga. 154; Topping v. Paddock, 92 Ill. 92; Kilworth v. Ice, 84 Kans. 458, 114 Pac. 857, 35 L. R. A. (N. S.) 220; Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44 S. W. 653; Ashbrook v. Ashbrook, 16 Ky. L. 593, 28 S. W. 660; Lee v. Lashbrook, 8 Dana (Ky.) 214; Millaudon v. Sylvestre, 8 La. 262; Miller v. Lord, 11 Pick. (Mass.) 11; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Godfrey v. White, 43 Mich. 171, 5 N. W. 243, 11 Mor. Min. Rep. 562; Morris v. Allen, 14 N. J. Eq. 44; Lewis v. Whitehall Lumber Co., 47 Hun (N. Y.) 637, 14 N. Y. St. 302; Buford v. Ashcroft, 72 Tex. 104, 10 S. W. 346; Cooke v. Benbow, 3 De G. J. & S. 1, 6 New Rep. 135. And compare Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Jones v. Jones, 36 N. Car. 332.

clear that interest should not be allowed on moneys furnished to the partnership as capital, either under the original agreement or as additions thereto; but when the amount to be furnished by each partner is fixed and certain, and the share of the respective partners in the profits of the partnership venture is a fixed proportion thereof, advances by one of the partners in excess of his prescribed proportion, although credited to the special account of such partner, and called 'capital' of the firm, are in fact, as between the partners, loans and advancements for the benefit of the partnership; and equity requires that interest should be allowed thereon."[32]

§ 362. **Right to interest on balance.**—So also in the present state of the law, it is unwise to attempt to prescribe with any degree of accuracy, the boundary within which a balance between partners is entitled to interest, this depending largely on the way in which the circumstances of the case have appealed to a court of equity,[33] although it is the tendency of most cases to hold that in the absence of an agreement, there is no right to

[32] Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82. See also Mack v. Engel, 165 Mich. 540, 131 N. W. 92.

[33] Forsyth v. Butler, 152 Cal. 396, 93 Pac. 90; Solomon v. Solomon, 2 Ga. 18; Taylor v. Peterson, 1 Idaho 513; King v. Hamilton, 16 Ill. 190; Cooper v. McNeill, 14 Ill. App. 408; Wendling v. Jennisch, 85 Iowa 392, 52 N. W. 341; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Boreing v. Wilson, 128 Ky. 570, 108 S. W. 914; Burgher v. Burgher, 12 Ky. L. (abstract) 95; Masonic Sav. Bank v. Bang's Admr., 10 Ky. L. 743, 10 S. W. 633; Hilligsberg's Exrs. v. Burthe, 6 La. Ann. 170; Gridley v. Conner, 2 La. Ann. 87; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Miller v. Lord, 11 Pick. (Mass.) 11; C. D. Smith Drug Co. v. Saunders, 70 Mo. App. 221; McCormick v. McCormick, 7 Nebr. 440; Buckingham v. Ludlum, 29 N. J. Eq. 345; Johnson v. Hartshorne, 52 N. Y. 173; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Stiles v. Haight, 124 App. Div. 60, 108 N. Y. S. 136; Masury v. Whiton, 43 Hun (N. Y.) 638, 6 N. Y. St. 697 (affd. 111 N. Y. 679, 18 N. E. 638, 2 Silv. Ct. App. 123); Goodwill v. Heim, 212 Pa. 595, 62 Atl. 24; Brenner v. Carter, 203 Pa. 75, 52 Atl. 178; Brown's Appeal, 89 Pa. St. 139; Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73; Meymott v. Meymott, 31 Beav. 445, 32 L. J. Ch. 218, 9 Jur. (N. S.) 426; Wilson v. McCarty, 25 Grant Ch. (U. C.) 152.

interest on balances due during the continuance of a partnership.[84] Even when interest does actually attach to such "balance," the latter must be understood ordinarily as referring to the one on final dissolution and settlement and not to any periodical balance struck off from time to time.[85] "Interest should not be allowed on partnership accounts before there has been an accounting or settlement of the same, unless under the peculiar facts and circumstances surrounding the case the equities demand that interest be charged."[86]

[84] See cases cited in preceding note. In re Stevens, 104 Fed. 323; Tutt v. Land, 50 Ga. 339; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127; Lamb v. Rowan, 83 Miss. 45, 35 So. 427; Goodwill v. Heim, 212 Pa. 595, 62 Atl. 24; Waggoner v. Gray, 2 Hen. & Mun. (Va.) 603; Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Gilman v. Vaughan, 44 Wis. 646; Rhodes v. Rhodes, 1 Johns. Ch. 653, 6 Jur. (N. S.) 600, 29 L. J. Ch. 418, 8 W. R. 204; Dinham v. Bradford, L. R. 5 Ch. 519.

[85] "Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or clearly implied, and the case must be a very strong one * * * to warrant its allowance without express agreement to that effect." Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127. So Burnam, J., in Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44 S. W. 653, approves an instruction which states in part: "nor would one party have the right to interest on the balance, from time to time in the partnership accounts, before a general settlement or dissolution of the partnership, in the absence of a special agreement to that effect." See further Colgin v. Cummins, 1 Port. (Ala.) 148; Dexter v. Arnold, 3 Mason (U. S.) 284, Fed. Cas. No. 3855; In re Stevens, 104 Fed. 323; Gage v. Parmelee, 87 Ill. 329; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Bowling's Heirs v. Dobyn's Admrs., 5 Dana (Ky.) 434; Glenn v. Sims, 5 Ky. L. (abstract) 775; Moore v. Westbrook, 156 N. Car. 482, 72 S. E. 842, Ann. Cas. 1913 A, 168; Holden v. Peace, 39 N. Car. 223, 45 Am. Dec. 514; In re Brown's Estate, 11 Phila. (Pa.) 127, 89 Pa. St. 139; McKay v. Overton, 65 Tex. 82; Gilman v. Vaughan, 44 Wis. 646. And compare In re Cleverdon, 4 Ont. App. 185; Moss v. McCall, 75 Ill. 190; Cooper v. McNeill, 14 Ill. App. 408; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Smith v. Knight, 88 Iowa 257, 55 N. W. 189.

[86] Goodwill v. Heim, 212 Pa. 595, 62 Atl. 24. See also Gage v. Parmelee, 87 Ill. 329; Dexter v. Arnold, 3 Mason (U. S.) 284, Fed. Cas. No. 3855; Seibert v. Ragsdale, 103 Ky. 206, 44 S. W. 653, 19 Ky. L. 1869; McKay v. Overton, 65 Tex. 82; Gilman v. Vaughan, 44 Wis. 646.

§ 363. When a partner is chargeable with interest on debts owing by him to the firm.—Whether a partner will be charged with interest on debts owing by him to the firm, must depend on the facts and circumstances of the particular case.[37] The general rule seems to be that in the absence of an express agreement, an agreement to pay interest will not be implied.[38] But in certain instances it has seemed to the courts to be inequitable to the other partners unless one partner is charged with interest on debts owed the firm, as where one withdraws funds for his individual use, unless there is an agreement that interest is not to be paid,[39] or the withdrawal was unnecessary[40] or there is an agreement that capital shall bear interest[41] or an incorrect statement of the amount withdrawn was made to the firm by one who had control of the books. But if the copartner assents to the withdrawal, it is held he can not charge the withdrawing partner with interest until his refusal to account for the sums taken out.[42]

§ 364. Right to contribution.—Contribution between partners is the right of one partner, who has paid more than his just proportion of firm debts, where the partnership assets are insufficient to meet the indebtedness, to compel his partners to pay him their just proportion of the deficit paid by him, and is

[37] Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674.

[38] Taylor v. Peterson, 1 Idaho 513; Wendling v. Jennisch, 85 Iowa 392, 52 N. W. 341; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194 (unless there is fraud in the party to be charged, or interest is allowed by mercantile usage); Miller v. Lord, 11 Pick. (Mass.) 11; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127; McCormick v. McCormick, 7 Nebr. 440; Brenner v. Carter, 203 Pa. 75, 52 Atl. 178; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Cooke v. Benbow, 3 DeG., J. & S. 1, 6 N. R. 135; Meymott v. Meymott, 31 Beav. 445, 32 L. J. Ch. 218, 9 Jur. (N. S.) 426.

[39] Forsyth v. Butler, 152 Cal. 396, 93 Pac. 90; Burgher v. Burgher, 12 Ky. L. (abstract) 95; Stiles v. Haight, 124 App. Div. 60, 108 N. Y. S. 136; Wilson v. McCarty, 25 Grant Ch. (U. C.) 152. Under Civil Code, Gridley v. Conner, 2 La. Ann. 87.

[40] Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467.

[41] Boreing v. Wilson, 128 Ky. 570, 108 S. W. 914; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73.

[42] Solomon v. Solomon, 2 Ga. 18.

a right well settled in partnership law. According to the Uniform Partnership Act: "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."[43] The fact that a partner can be held by a third person for the entire amount of a firm contract upon which, as to his copartners, he is but pro rata liable,[44] invests him necessarily, from an equitable standpoint, in the absence of an agreement to the contrary,[45] or illegality inherent in the partnership,[46] with the right to exact contribution from his copartners,[47] in the matter of all losses and expenses which he has bona fide incurred for the benefit of the partnership in the course of its business while acting within the scope of his authority as a member of

[43] Uniform Partnership Act, § 18(b).

[44] See § 495 et seq.

[45] Northen v. Tatum, 164 Ala. 368, 51 So. 17; McCormick v. Stofer, 11 Ky. L. 398, 12 S. W. 151; Baker v. Safe Deposit & Trust Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. 463; Hart v. Myers, 25 Abb. N. Cas. (N. Y.) 478, 12 N. Y. S. 140 (affd. 59 Hun (N. Y.) 420, 13 N. Y. S. 388, 36 N. Y. St. 641); McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874; Gillan v. Morrison, 1 DeG. & Sm. 421, 11 Jur. 861; In re Worcester Corn Exchange Co., 3 DeG., M. &. G. 180, 22 L. J. Ch. 593, 17 Jur. 721, 1 W. R. 171. See further Mussetter v. Timmerman, 11 Colo. 201, 17 Pac. 504; Warring v. Hill, 89 Ind. 497; Myers v. Smith, 15 Iowa 181; Neal v. Berry, 86 Maine 193, 29 Atl. 987; Hanna v. Hyatt, 67 Mo. App. 308; Gilmore v. Ham, 61 Hun (N. Y.) 1, 15 N. Y. S. 391, 39 N. Y. St. 664, 21 Civ. Proc. (N. Y.) 102, (affd. 133 N. Y. 664, 31 N. E. 624); Curtis v. Monteith, 1 Hill (N. Y.) 356; Gray v. Williams, 9 Humph. (Tenn.) 503; Long v. Garnett, 59 Tex. 229.

[46] See §§ 175, 176, 177.

[47] Sears v. Starbird, 78 Cal. 225, 20 Pac. 547; Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52; Flower v. Millaudon, 19 La. 185; Phillips v. Blatchford, 137 Mass. 510; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17; Edison Electric Illuminating Co. v. DeMott, 51 N. J. Eq. 16, 25 Atl. 952; Gilmore v. Ham, 61 Hun (N. Y.) 1, 15 N. Y. S. 391, 39 N. Y. St. 664, 21 Civ. Proc. (N. Y.) 102 (affd. 133 N. Y. 664, 31 N. E. 624); Brasher's Exrs. v. Cortlandt, 2 Johns. Ch. (N. Y.) 400; Mendez v. Schleuter, 30 N. Y. St. 150, 9 N. Y. S. 278; Forbes v. Webster, 2 Vt. 58. In the case of Clayton v. Davett (N. J.), 38 Atl. 308, the contribution sought of the equitable mortgagee of a partner's share was refused. See, however, Hax v. Burnes, 98 Mo. App. 707, 73 S. W. 928.

the firm.[48] There is a right to contribution for money advanced to purchase property used in the firm business, and purchased

[48] "Unless otherwise provided in the articles of partnership, the expenses and losses of a partnership are to be borne by all the members in the proportion they share in the profits; and losses occasioned by conduct or omission of a managing partner will not be charged against him unless he has been guilty, in the conduct or omission, of fraud, bad faith, or culpable negligence." Northen v. Tatum, 164 Ala. 368, 51 So. 17. See further Christian &c. Grocery Co. v. Hill, 122 Ala. 490, 26 So. 149; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3; Morrison v. Smith, 81 Ill. 221; Campbell v. Stewart, 34 Ill. 151; Savery v. Thurston, 4 Ill. App. 55; Price v. Cavins, 50 Ind. 122; Olleman v. Reagan, 28 Ind. 109; Easton v. Strother, 57 Iowa 506, 10 N. W. 877; Atherton v. Cochran, 11 Ky. L. 185, 9 S. W. 519, 11 S. W. 301; Craig v. Alverson, 6 J. J. Marsh. (Ky.) 609; Savage v. Carter, 9 Dana (Ky.) 408; Jones v. Morehead, 3 B. Mon. (Ky.) 377; Gardner v. Salyer, 1 Ky. L. (abstract) 420; Bayly v. Becnel, 36 La. Ann. 496; Tuyes v. Avegno, 23 La. Ann. 177; Flower v. Millaudon, 19 La. 185; Pratt v. McHatton, 11 La. Ann. 260; Maginnis v. Crosby, 11 La. Ann. 400; Burleigh v. White, 70 Maine 130; Phillips v. Blatchford, 137 Mass. 510; Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127; Wheeler v. Arnold, 30 Mich. 304; Vaiden v. Hawkins (Miss.), 6 So. 227; Cockrell v. Thompson, 85 Mo. 510; Inglis v. Floyd, 33 Mo. App. 565; Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832; Edison Electric Illuminating Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Coleman v. Coleman, 12 Rich. L. (S. Car.) 183; Babb v. Mosby, 7 Lea (Tenn.) 105; Gray v. Williams, 9 Humph. (Tenn.) 503; Martin v. Taylor (Tex. Civ. App.), 141 S. W. 1009; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; Bufford v. Ashcroft, 72 Wis. 104, 10 S. W. 346; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. See further Ex parte Chippendale, 4 DeG., M. & G. 19, 18 Jur. 710; Durant v. Rogers, 87 Ill. 508; Noel v. Bowman, 2 Litt. (Ky.) 46; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Laylin v. Knox, 41 Mich. 40, 1 N. W. 913; Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77; May v. Troutman, 4 Pa. Super. Ct. 42; Stebbins v. Willard, 53 Vt. 665; Wright v. Hunter, 5 Ves. 792; Bradbury v. Barnes, 19 Cal. 120; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Meserve v. Andrews, 106 Mass. 419; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Lee's Exrx. v. Dolan's Admx., 39 N. J. Eq. 193 (affd. 40 N. J. Eq. 338); Sell's Admr. v. Hubbell's Admrs., 2 Johns. Ch. (N. Y.) 394; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869. In this connection it is hardly necessary to cite authority to support the proposition that contribution will not be enforced when it has become desirable by reason of the demanding partner's culpable negligence or wilful misconduct—in which latter is included the exceeding of his authority, the disregard of instructions given, and the like. Thomas v. Atherton, 10 Ch. Div. 185, 48 L. J. Ch. 370, 40 L. T. 77; Cragg v. Ford, 1 Y. & C. Ch. 285; McFadden v. Leeka,

after partnership liability began,[49] and for money expended for the purchase of patent rights under a firm agreement, although the patent rights were worthless.[50] This right to exact contribution, however, must not be misunderstood. It consists, ordinarily, of the right to be credited on the taking of an account and the making of a settlement with all property, owned privately and individually, that has been expended in the carrying out of any firm undertaking.[51] Further, the right of a partner to contribution can not, in general, be defeated by the illegality of the transaction from which loss has resulted,[52] unless the partnership is itself illegal,[53] or the act involved has been com-

48 Ohio St. 513, 28 N. E. 874. See further Rockefeller v. Morehouse, 4 Ohio Dec. (Reprint) 247, 1 Cleve. L. Rep. 164. As to contribution where one partner has put in labor and skill, see In re Aldridge (1894), 2 Ch. 97, 8 Reports 189, 70 L. T. 724, 42 W. R. 409, 63 L. J. Ch. 465; Morris v. Neel, 78 Ga. 797, 3 S. E. 643; Manley v. Taylor, 50 N. Y. Super. Ct. 26, following Hasbrouck v. Childs, 16 N. Y. Super. Ct. 105; Emerick v. Moir, 124 Pa. St. 498, 17 Atl. 1.

[49] Sperry v. Tulley (W. Va.), 84 S. E. 1067.

[50] Martin v. Taylor (Tex. Civ. App.), 141 S. W. 1009.

[51] While this holds good in general, it does not by any means apply in every instance, there being apparent authority to support the proposition that, the circumstances requiring it, one former partner may, at least after dissolution and final settlement, bring an action at law against his one-time copartner to compel contribution. Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Crossley v. Taylor, 83 Ind. 337; Clarke v. Mills, 36 Kans. 393, 13 Pac. 569; Wright v. Eastman, 44 Maine 220; Torrey v. Twombly, 57 How. Pr. (N. Y.) 149; Farmer v. Putnam, 35 Misc. (N. Y.) 32, 70 N. Y. S. 179; McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735; Rush Centre Creamery Co. v. Hillis, 3 Pa. Super. Ct. 527; Murray v. Herrick, 171 Pa. 21, 32 Atl. 1125; Compton v. Thorn's Admr., 90 Va. 653, 19 S. E. 451; Newman v. Ruby, 54 W. Va. 381, 46 S. E. 172. But compare Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Hennegin v. Wilcoxin, 13 La. Ann. 576; Phillips v. Blatchford, 137 Mass. 510; Bond v. Bemis, 55 Mo. 524.

[52] Adamson v. Jarvis, 4 Bing. 66, 5 L. J. (O. S.) C. P. 68; Thomas v. Atherton, 10 Ch. Div. 185, 48 L. J. Ch. 370, 40 L. T. 77; Betts v. Gibbins, 2 Ad. & El. 57, 4 L. J. K. B. 1, 4 N. & M. 64; Ramskill v. Edwards, 31 Ch. Div. 100, 55 L. J. Ch. 81, 53 L. T. 949, 34 W. R. 96; Lingard v. Bromley, 1 V. & B. 114, 2 Rose 118, 12 R. R. 195; Baynard v. Woolley, 20 Beav. 583; Ashurst v. Mason, L. R. 20 Eq. 225, 44 L. J. Ch. 337, 23 W. R. 506; Clayton v. Davett (N. J. Eq.), 38 Atl. 308. But see Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

[53] Watson v. Fletcher, 7 Grat. (Va.) 1. And compare In re Longworth's

mitted by the partner seeking contribution, when he was at least chargeable with knowledge that it was unlawful.[54] This rule was applied and contribution allowed where one partner settled for a trespass in cutting timber on land formerly owned by the partnership but sold by the state for taxes, he in good faith believing he had a right to cut the timber,[55] and where one member of a firm of lawyers refunded a fee which had been illegally, but in good faith under a mistake as to law, allowed.[56] Where there is moral guilt by the person seeking contribution, through which the claim paid arose, no right of contribution exists. A forcible illustration in point is a case[57] where the party seeking contribution had been compelled, in an action of deceit, to pay certain notes which had been held by the firm, and which had been sold by the partner seeking contribution from his partners, through his false and fraudulent representations concerning the solvency of the maker of the notes. However, even where an "unlawful act has been knowingly performed by all the partners, so that all are in pari delicto," it seems "that the loss ought to be apportioned between all the partners, unless, the illegal act in question is a pure tort,[58] or a direct violation of some statute, or unless the contract of partnership is itself

Executor's Case, Johns. 465, on appeal, 1 DeG., F. & J. 17; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631.

[54] Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593; Cumpston v. Lambert, 18 Ohio 81, 51 Am. Dec. 442; Spalding v. Oakes, 42 Vt. 343; In re Ryan's Estate, 157 Wis. 576, 147 N. W. 993; Thomas v. Atherton, 10 Ch. Div. 185, 48 L. J. Ch. 370, 40 L. T. 77; Adamson v. Jarvis, 4 Bing. 66, 5 L. J. (O. S.) C. P. 68; Betts v. Gibbins, 2 Ad. & El. 57, 4 N. & M. 64, 4 L. J. K. B. 1; Aubert v. Maze, 2 Bos. & P. 371, 5 R. R. 624; Campbell v. Campbell, 7 Cl. & F. 166. See further Wooley v. Batte, 2 Car. & P. 417; Pearson v. Skelton, 1 M. & W. 504, 1 Tyr. & G. 843; Pratt v. McHatton, 11 La. Ann. 260.

[55] Edwards v. Zuck, 171 Mich. 29, 136 N. W. 1122.

[56] In re Ryan's Estate, 157 Wis. 576, 147 N. W. 993.

[57] Clayton v. Davett (N. J. Eq.), 38 Atl. 308 (1897).

[58] Baynard v. Woolley, 20 Beav. 583. See further Ashurst v. Mason, L. R. 20 Eq. 225, 44 L. J. Ch. 337, 23 W. R. 506. And compare Thomas v. Atherton, 10 Ch. Div. 185, 48 L. J.

void on the ground of illegality."[59] As between joint wrongdoers, where a part only of the joint wrongdoers are compelled to pay the claim, even though they pay more than their proportionate share, there is no right of contribution if the act done must have been presumed by the doers to be unlawful,[60] and, inasmuch as every one is presumed to know the law, an act which is made criminal by statute is necessarily presumed to exclude any right to contribution from the other partners, if the offending partner suffer loss by reason of the commission of such act.[61]

§ 365. **Contribution—Limit.**—In the absence of an agreement defining the limit of contribution,[62] such limit is not arbitrarily fixed either by the amount of stipulated partnership capital,[63] or by the extent, relatively considered, of the interest of the partner from whom contribution is sought, in the property of the firm.[64] In a Kentucky case[65] the court quotes from Lindley on Partnership the following general rule: "Partners must contribute ratably to their shares toward the losses and debts of the firm" and the court further accepts this statement as the accepted doctrine on the subject. It is there laid down, in addition to the fact that the right of contribution exists, that it exists in proportion to the shares of the partners in the firm. In the absence of any agreement as to the respective shares, there

Ch. 370, 40 L. T. 77; Attorney-General v. Fishmongers Co., Cr. & Ph. 1.

[59] Lindley Partnership, *379.

[60] Grund v. Van Vleck, 69 Ill. 478; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663; Bryan v. Landon, 5 Thomp. & C. (N. Y.) 594, 3 Hun (N. Y.) 500; Adamson v. Jarvis, 4 Bing. 66, 5 L. J. (O. S.) C. P. 68.

[61] Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593.

[62] In re Worcester Corn Exchange Co., 3 DeG., M. & G. 180, 22 L. J. Ch. 593, 17 Jur. 721, 1 W. R. 171; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[63] Ex parte Chippendale, 4 DeG., M. & G. 19, 18 Jur. 710. See further Taylor v. Coffing, 18 Ill. 422.

[64] Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Scott v. Bryan, 96 N. Car. 289, 3 S. E. 235; In re Maria Anna & Steinbank Coal & Coke Co., 6 Ch. Div. 447, 46 L. J. Ch. 819, 37 L. T. 201, 25 W. R. 857. See further Maginnis v. Crosby, 11 La. Ann. 400; Kincaid v. Hocker, 7 J. J. Marsh. (Ky.) 333.

[65] Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. 605 (1896).

would probably arise an implication that the shares were equal shares.

§ 366. Right to indemnity from loss caused by copartner. —Where a member of a partnership causes it to sustain a loss by his misconduct, by violation of the partnership agreement, or, in a proper case, by lack of skill and diligence, his copartners have the right to obtain from him indemnity for the loss, and his duty is to indemnify them.[66] It is well settled and definitely understood that partners sustain a relation of trust and confidence one to the other. Each must adhere to the partnership agreement and confine his acts within the scope of the partnership business. If any one of the partners fails to do this, and the other member or members of the firm sustain a loss by reason of their copartner's default, he must indemnify them.[67] This rule has been applied where a partner gave credit to an insolvent relative in violation of express agreement,[68] accepted worthless commercial paper in violation of a partnership agreement,[69] made and sold goods of inferior quality, rendering the firm liable to the vendee in damages,[70] stored perishable goods negligently in violation of agreement,[71] tortiously removed necessary parts from a partnership sawmill, causing it to be idle,[72] used the partnership name in place of his own in indorsing notes,[73] canceled a firm contract for the sale of lands and sold lands of his own instead,[74] or can-

[66] Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578; Charlton v. Sloan, 76 Iowa 288, 41 N. W. 303; Yorks v. Tozer, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. 395; Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. S. 372, 170 N. Y. 357, 63 N. E. 342; Newby v. Harrell, 99 N. Car. 149, 5 S. E. 284, 6 Am. St. 503; Holden v. Thurber (R. I.), 72 Atl. 720; Brown v. Orr, 110 Va. 1, 65 S. E. 499, 135 Am. St. 912.

[67] Campbell v. Campbell, 7 Clark & F. 166; Givens v. Berry, 21 Ky. L. 680, 52 S. W. 942; Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519; Forney v. Adams, 74 Mo. 138; Mechem's Cases 227; Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206.

[68] McCoy v. Crossfield, 54 Ore. 591, 104 Pac. 423.

[69] Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519.

[70] Kintrea v. Charles, 12 Grant Ch. (U. C.) 123.

[71] Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840.

[72] Ball v. Levin, 48 La. Ann. 359, 19 So. 118.

[73] Smith v. Loring, 2 Ohio 440.

[74] Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113.

celed firm contracts just before his withdrawal from the partnership, and then obtained them for individual benefit after withdrawal.[75]

§ 367. Right to subrogation.—In general the right of subrogation does not during the continuance of the partnership exist between partners, and one partner who has paid from his own means debts or liabilities against the firm is not usually subrogated to the rights of creditors in the debts he has paid, unless there is an agreement of partners creating the relation of principal and surety.[76] The rights of partners to contribution and accounting for such liabilities paid, are such as to do away with the necessity of subrogation. But if there is such an agreement that the partner can be said to be a surety for the firm, then on paying its debt, he is subrogated to all rights of the holder of the debt,[77] or if the debt is that of the partners as individuals and one partner pays them.[78] Some cases seem to allow the right to subrogation after an accounting has been had and a balance due found,[79] and a few authorities hold that where a mortgage debt of the firm is paid by a partner he may keep the mortgage alive until the other partner's share is repaid.[80] As a rule after dissolution, if a partner pays judgments against, or debts of, the firm, he is subrogated to the rights of the creditors whose claims were satisfied by him,[81] but in some cases the right, under

[75] Axton v. Kentucky Bottlers' &c. Co., 159 Ky. 51, 166 S. W. 776, Ann. Cas. 1915 D, 74.

[76] Coleman v. Coleman, 78 Ind. 344; Evans v. Rhea, 12 Ky. L. 224, 14 S. W. 82; Gordon v. His Creditors, 6 Rob. (La.) 328; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17; Booth v. Farmers &c. Nat. Bank, 74 N. Y. 228 (affg. 11 Hun (N. Y.) 258); Sterling v. Brightbill, 5 Watts (Pa.) 229, 30 Am. Dec. 304; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Hinton v. Odenheimer, 57 N. Car. (4 Jones Eq.) 406; Dana v. Conant, 30 Vt. 246; Sand's Admr. v. Durham, 36 S. E. 472, 98 Va. 392.

[77] McMillan v. James, 105 Ill. 194; Averill v. Loucks, 6 Barb. (N. Y.) 470; National Bank v. Cushing, 53 Vt. 321; Field v. Hamilton, 45 Vt. 35; Buchanan v. Clarke, 10 Grat. (Va.) 164.

[78] O'Bryan v. Neil, 84 Ga. 134, 10 S. E. 598.

[79] Fessler v. Hickernell, 82 Pa. 150; Baily v. Brownfield, 20 Pa. 41.

[80] Stebbins v. Willard, 53 Vt. 665. See Laylin v. Knox, 41 Mich. 40, 1 N. W. 913.

[81] In re Smith, Fed. Cas. No. 12991, 16 Nat. Bankr. Reg. 113; Tibbetts v. Magruder, 9 Dana (Ky.) 79; Hall v. Gaiennie, 18 La. 442; In re Swayne. [1]

the circumstances, has been denied.[82] To a partner or partners who assume debts of the firm, on dissolution the other members occupy the position of sureties, so that if any of them pay debts which another partner or partners have assumed, they are entitled to subrogation to the creditors' rights.[83] If the dissolution of the firm is by death, on paying more than the proportionate share of firm debts, either the surviving partner or the estate of the deceased partner is entitled to subrogation to the rights of creditors.[84]

§ 368. Right to sue firm or copartner for negligence as to individual property.—It has been held in one case that where the business of a partnership is carried on by an agent and one partner's individual property is injured by the negligent conduct of the business, the partnership is liable to the partner in damages. In this case the partners operated a threshing machine for hire, serving the members and the public alike, and the management was in the hands of a board who appointed a manager who transacted all the business, and who was aware of a defect in the engine which caused a spark to set fire to the barn of one partner, while threshing his wheat.[85] It has also been

Clark (Pa.) 457, 3 Pa. Law J. 121; Stebbins v. Willard, 53 Vt. 665; Sands v. Durham, 99 Va. 263, 38 S. E. 145, 54 L. R. A. 614, 86 Am. St. 884; Rowlett v. Grieve's Syndics, 8 Mart. (O. S.) (La.) 483, 13 Am. Dec. 296.

[82] Dill v. Voss, 94 Ind. 590; Richmond v. Marston, 15 Ind. 134; Pearce v. Yost, 1 Wkly. Notes Cas. (Pa.) 472; Conrad v. Buck, 21 W. Va. 396.

[83] Chandler v. Higgins, 109 Ill. 602; Conwell v. McCowan, 81 Ill. 285; Swan v. Smith, 57 Miss. 548; Waddington v. Vredenbergh, 2 Johns. Cas. (N. Y.) 227; Butler v. Birkey, 13 Ohio St. 514; Scott's Appeal, 88 Pa. St. 173; In re Frow, 73 Pa. St. 459; Buck Stove Co. v. Johnson, 7 Lea (Tenn.) 282; Ætna Ins. Co. v. Wires, 28 Vt. 93; Highland v. Highland, 5 W. Va. 63. Contra: Griffin v. Orman, 9 Fla. 22.

[84] Harter v. Songer, 138 Ind. 161, 37 N. E. 595; Dahlgren v. Duncan, 7 Smed. & M. (Miss.) 280; Sells v. Hubbell, 2 Johns. Ch. (N. Y.) 394; Morris v. Morris, 4 Grat. (Va.) 293; Gee v. Humphries, 49 S. Car. 253, 27 S. E. 101. But see denying right of subrogation, Bartlett v. McRae, 4 Ala. 688; Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Singizer's Appeal, 28 Pa. St. 524.

[85] Bigelow v. Powers, 25 Ont. L. 28, Ann. Cas. 1912 C, 959. The court said: "So far as the facts are con-

held that where one partner in the course of partnership business, negligently injures the individual property of a copartner,

cerned, it is a fallacy to say that the firm's acts were the plaintiff's acts, and that Dowson's negligence was his negligence, and that Dowson's knowledge was his knowledge. Is it not equally fallacious in law? Suppose the case of a firm carrying on its business in a building beside or near the dwelling house of a copartner, which is owned solely by him in his private and individual capacity, and has nothing to do with the partnership or its property. Suppose that, owing to negligence on the part of the firm or its employés, neither participation in or knowledge of which is imputable to the partner in his individual capacity, an explosion occurs on the firm's premises which wrecks the partner's dwelling. Can it be the law that under such circumstances, the loss of his dwelling must be borne by the partner alone, I am unable to see why the other members of the firm should be allowed to shelter the firm and themselves under the argument that, though true, it is that the firm, and not the partner who suffered, caused the injury and loss, the law says that the partner was the author of his own injury and must himself bear the loss. I see no reason why it should be so more than it is where there is an incorporated company, and the injury and loss is inflicted upon a shareholder. There is, of course, the long-existing technical objection that the firm not being a legal entity, the partner can not be both plaintiff and defendant, and that, if he sues the firm, he is suing himself, but that objection has been removed in cases of promissory notes and the like, to which I have referred, and there seems no good reason why it should bar an action founded on a claim such as the present. * * * Nor, with great respect, do I think the case can be likened to the case of a partner injured through the negligence of a servant of the partnership while actually engaged by the partner to render him a service which it was the servant's duty to render to him and which he had a right to require the servant to render him at the time. Here the service Dowson was rendering was not a service rendered to the plaintiff as a duty owing to him because of his position as a partner. He was giving the service as the employé and servant of the firm in the course of its business. It was part of the firm's business to render these services to the plaintiff in the same way and not otherwise than they would be rendered to any other person who sought and paid for them. The firm was dealing with the plaintiff in the same way and on the same terms as its other customers. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm. And there is no authority for saying that for such a loss he should not be recouped by the firm, just as others would be. The negligent act of the firm's servant in such a case ought not to be so attributed to the plaintiff as to preclude him from saying to the firm that the loss resulting to him was the outcome of its servant's negligence, and that it should make good the consequences.

the latter may maintain an action against the former for damages.[86]

§ 369. Right to keeping of accounts and accounting.— Among the basic rights of each member of the partnership are accuracy in accounting in all matters of firm business, and accessibility at all reasonable times to all partnership records.[87] The rule is thus stated in the Uniform Partnership Act: "The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them."[88] And the chancellor will not be diligent in shaping partnership accounts so that a

Probably this is only another manner of enforcing contribution; but if so, there seems to be no reasonable objection to it on that ground. Why should the fact that the loss is the loss of the plaintiff's own property place him in any different or worse position? He is out of pocket to the same extent as if he had paid it or made it good to a third person. His position ought not be any worse than if that was what he had been obliged to do."

[86] Haller v. Willamowicz, 23 Ark. 566; Newby v. Harrell, 99 N. Car. 149, 5 S. E. 284, 6 Am. St. 503.

[87] Pierce v. Scott, 37 Ark. 308; Chandler v. Sherman, 16 Fla. 99; Webb v. Fordyce, 55 Iowa 11, 7 N. W. 385; O'Brien v. Pentz, 48 Md. 562; Hall v. Clagett, 48 Md. 223; Lilly v. Kroesen, 3 Md. Ch. 83; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; McAlpine v. Miller, 104 Minn. 289, 116 N. W. 583; Saunders v. Duval, 19 Tex. 467; Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73; Wood v. Beath, 23 Wis. 254; Rowe v. Wood, 2 Jac. & W. 559, 22 R. R. 208; Greatrex v. Greatrex, 1 DeG. & Sm. 692, 11 Jur. 1052. And compare Trego v. Hunt (1896), A. C. 7, 65 L. J. Ch. 1, 73 L. T. 514, 44 W. R. 225; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Doane v. Cummins, 11 Conn. 152; Gage v. Parmelee, 87 Ill. 329; Over v. Hetherington, 66 Ind. 365; Kemp v. Smith, 88 Iowa 725, 55 N. W. 36; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949, 12 Ky. L. 751; Joplin v. Cordrey, 9 Ky. L. 445, 5 S. W. 397; Funk v. Leachman, 4 Dana (Ky.) 24; Theall v. Lacey, 5 La. Ann. 548; Bevans v. Sullivan, 4 Gill (Md.) 383; Pomeroy v. Benton, 77 Mo. 64; Pierce v. Ten Eyck, 9 Mont. 349, 23 Pac. 423; Allen v. Coit, 6 Hill (N. Y.) 318; Burchell v. Voght, 35 App. Div. 190, 55 N. Y. S. 80 (affd. 164 N. Y. 602, 58 N. E. 1085); Heartt v. Corning, 3 Paige (N. Y.) 566; Jung v. Weyand, 9 Ohio Dec. (Reprint) 485, 14 Wkly. Law Bul. 143; Keys v. Baldwin. 10 Ohio Dec. (Reprint) 271, 19 Wkly. Law Bul. 376; In re Fulmer's Appeal, 90 Pa. St. 143; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140.

[88] Uniform Partnership Act, § 19.

partner who has failed to keep them accurately may profit by his own negligence,[89] and presumptions are indulged against a partner who keeps accounts unintelligibly, does not keep them at all or destroys or hides them.[90] But one partner can not complain that the books kept by his associate are incomplete and fail to show all they should show when for more than twenty years he has tolerated and seems to have authorized such a crude and deficient system of bookkeeping.[91] So, also, it has been held that entries upon partnership books which have remained unquestioned for a period of twelve years, can not be attacked after the expiration of such time.[92] Likewise where a partner covenants to keep proper accounts of the transactions of his firm and fails to do so but there is nothing which can be justly taken as an impeachment of his integrity or which raises a suspicion that his delinquency was wilful, and it appears that he did as well as he could, considering his absolute incompetency and that his associate condoned or waived his lack of capacity, the maxim omnia praesumuntur contra spoliatorem is inapplicable.[93] And where a partner at the time a transaction was carried on acquiesced in the keeping of statements showing gross expenses, he is estopped from demanding details later.[94] As to the right to an accounting the Uniform Partnership Act provides that: "Any partner shall have the right to a formal account as to partnership affairs: (a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners, (b) If the right exists under the terms of any agreement, (c) As provided by Section 21, [which renders a partner liable to account for benefits or profits received from the property or its use without the consent of copartners] (d) Whenever other circumstances render it just and reasonable."[95] And under

[89] Hume v. McNees, 10 Ky. L. 947, 10 S. W. 384.

[90] Pierce v. Scott, 37 Ark. 308; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Walmsley v. Walmsley, 3 Jo. & La. T. 556; Gray v. Haig, 20 Beav. 219.

[91] Shoemaker v. Shoemaker, 29 Ky. L. 134, 92 S. W. 546.

[92] Lewis v. Loper, 54 Fed. 237.

[93] Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140.

[94] House v. Linn, 179 Ill. App. 114.

[95] Uniform Partnership Act, § 22.

the general holdings the right of a partner to demand an accounting of his copartner of copartners under certain conditions can not be denied, but will not be here discussed, as the question of accounting is deemed of sufficient importance to be discussed in a chapter by itself, and will there be considered.[96]

§ 370. **Arbitration of differences between partners.**—It is sometimes provided in partnership agreements that in the event of disagreement between the partners as to matters connected with the conduct or dissolution of the business, they shall submit to the decision of arbitrators, the manner of whose selection is provided for. When the partners have lawfully submitted differences between them to arbitration and the award has been made, it will be enforced by courts in a proper case,[97] unless the award proceeded on a mistake,[98] and a settlement by arbitration is a bar to a suit for breach of a partnership agreement.[99] However, it does not seem that a stipulation for arbitration is a bar to a suit for accounting by a partner who refuses to comply with it, or that the courts will decree specific performance of an arbitration.[1] The arbitration of matters arising on final distribution and settlement will be considered in a later chapter.[2]

§ 371. **Partner's lien.**—A partner's lien may be denominated or described as the right of each member of the firm, against each other member thereof and against each of those asserting partnership rights thereunder, to demand that the property of the partnership[3] be finally applied originally in discharge

[96] See chs. 21, 23.

[97] Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92; De Pusey v. Du Pont, 1 Del. Ch. 82; Gibson v. Moore, 6 N. H. 547; Piper v. Smith, 1 Head (Tenn.) 93; Lamphire v. Cowan, 39 Vt. 420; Smith v. Clark, 22 Tex. Civ. App. 485, 54 S. W. 1052; Lingood v. Eade, 2 Atk. 501; Green v. Warning, 1 W. Bl. 475.

[98] Spencer v. Spencer, 2 Y. & J. 249, 31 R. R. 583.

[99] Madison v. Henderson, 86 Ill. App. 113.

[1] Meaher v. Cox, 37 Ala. 201; Page v. Vankirk, 1 Brewst. (Pa.) 282; 6 Phila. (Pa.) 264; Dawson v. Fitzgerald, 1 Ex. Div. 257; Agar v. Macklew, 1 Eng. Ch. 418, 2 Sim. & L. 418, 4 L. J. (O. S.) Ch. 16.

[2] See ch. 21.

[3] Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Nichol v. Stewart, 36 Ark. 612; Duryea v. Burt, 28 Cal.

of the debts and liabilities of the common business and then to have all over and above the same used in satisfaction of the amounts owing the separate partners first as such, and secondly as individuals.[4] As said in one case: "In settling partnership

569; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Evans v. Hawley, 35 Iowa 83; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Collins v. Decker, 70 Maine 23; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Crooker v. Crooker, 46 Maine 250; Mann v. Higgins, 7 Gill (Md.) 265; Arnold v. Wainwright, 6 Minn. 358, 80 Am. Dec. 448; Dilworth v. Mayfield, 36 Miss. 40; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Hiscock v. Phelps, 49 N. Y. 97; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Mendenhall v. Benbow, 84 N. Car. 646; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Lane v. Jones, 9 Lea (Tenn.) 627; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Cowan McClung v. Gill, 11 Lea (Tenn.) 674; Digg v. Brown, 78 Va. 292; West v. Skip, 1 Ves. 456; Payne v. Hornby, 25 Beav. 280; Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237; Nerot v. Burnaud, 4 Russ. 247.

[4] "Each partner has a lien on the partnership assets for the protection of his rights upon the settlement of partnership accounts." In re Kessler, 174 Fed. 906. "The rule is well settled, especially by courts of equity, that the assets of a partnership must be first applied to the payment of partnership creditors before anything can be applied to the claims of the individual partners thereof or their creditors. This does not result from any lien which the creditors have upon the assets, because they as such have no lien; but it results from the lien which each partner has to have the assets of the partnership applied first to the payment of the firm's debts, and then to the payment of whatever may be due to him from the other partners or partnership accounts. The partnership creditors are practically subrogated to the partner's lien upon the partnership property, and their rights to priority depend upon these." Lacey v. Cowan, 162 Ala. 546, 50 So. 281. See further West v. Skip, 1 Ves. 456; Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237; Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Evans v. Winston, 74 Ala. 349; Warren v. Taylor, 60 Ala. 218; Hart v. Clark, 54 Ala. 490; Coffin v. McCullough's Admr., 30 Ala. 107; McGown v. Sprague, 23 Ala. 524; Donelson's Admrs. v. Posey, 13 Ala. 752; Smith v. Rainey, 9 Ariz. 362, 83 Pac. 463; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Summers v. Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Leedom v. Ham, 116 Cal. xvi, 48 Pac. 222; Shinn v. Macpherson, 58 Cal. 596; McCauley v. Fulton, 44 Cal. 355; Crane v. Dryer, 9 Cal. App. 290, 98 Pac. 1072; Beecher v. Stevens, 43 Conn. 587; Griffin v. Orman, 9 Fla. 22; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am.

St. 373; Rainey v. Nance, 54 Ill. 29; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Reeves v. Ayers, 38 Ill. 418; Royston v. John Spry Lumber Co., 85 Ill. App. 223; Hargadine-McKittrick Dry Goods Co. v. Belt, 74 Ill. App. 581; Johnson v. McClary, 131 Ind. 105, 30 N. E. 888; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Matlock v. Matlock, 5 Ind. 403; Sanders v. Herndon, 33 Ky. L. 669, 110 S. W. 862; Rumsey-Sikemeier Co. v. Bank of Aurora, 139 Mo. App. 306, 123 S. W. 75; Caldwell Banking &c. Co. v. Porter, 52 Ore. 318, 95 Pac. 1, 97 Pac. 541; Adams v. Hubbard, 221 Pa. 511, 70 Atl. 835; Maitland v. Purdy, 49 Wash. 575, 96 Pac. 154; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208. See also Stout v. Fortner, 7 Iowa 183; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84; Pierce v. Wilson, 2 Iowa 20; Ely v. Hair, 16 B. Mon. (Ky.) 230; Talbot v. Pierce, 14 B. Mon. (Ky.) 195; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; White v. Woodward, 8 B. Mon. (Ky.) 484; Black v. Bush, 7 B. Mon. (Ky.) 210; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; January v. Poyntz, 2 B. Mon. (Ky.) 404; Meador v. Hughes, 14 Bush (Ky.) 652; Howell v. Commercial Bank, 5 Bush (Ky.) 93; O'Bannon v. Miller, 4 Bush (Ky.) 25; Bank of Kentucky v. Herndon, 1 Bush (Ky.) 359, 89 Am. Dec. 630; Conwell v. Sandidge's Admr., 8 Dana (Ky.) 273; Hodges v. Holeman, 1 Dana (Ky.) 50; Jones v. Lusk, 2 Metc. (Ky.) 356; Harlan v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. 360; Couchman's Admr. v. Maupin, 78 Ky. 33; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Evans v. Rhea, 12 Ky. L. 224, 14 S. W. 82; Anderson v. Morris, 10 Ky. L. (abstract) 544; King v. Shaw, 9 Ky. L. (abstract) 577; Flanagan v. Shuck, 82 Ky. 617, 6 Ky. L. 699; Cooper v. Webster, 4 Ky. L. (abstract) 734; West v. Armstrong, 4 Ky. L. (abstract) 998; Calder v. Their Creditors, 47 La. Ann. 346, 16 So. 852; Johnson v. Hersey, 70 Maine 74, 35 Am. Rep. 303; Hacker v. Johnson, 66 Maine 21; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Crooker v. Crooker, 46 Maine 250; Mann v. Higgins, 7 Gill (Md.) 265; Pierce v. Tiernan, 10 Gill & J. (Md.) 253; Sanderson v. Stockdale, 11 Md. 563; Glenn v. Gill, 2 Md. 1; Freeman v. Stewart, 41 Miss. 138; Dilworth v. Mayfield, 36 Miss. 40; Lester v. Givens, 74 Mo. App. 395; Dieckmann v. St. Louis, 9 Mo. App. 9; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Whitmore v. Shiverick, 3 Nev. 288; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Uhler v. Semple, 20 N. J. Eq. 288; Hill v. Beach, 12 N. J. Eq. 31; Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480, 45 Am. Dec. 412; Deveau v. Fowler, 2 Paige (N. Y.) 400; Frith v. Lawrence, 1 Paige (N. Y.) 434; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Addison v. Burckmyer, 4 Sandf. Ch. (N. Y.) 498; Robb v. Stevens, 1 Clarke Ch. (N. Y.) 191; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Thornton v. Lambeth, 103 N. Car. 86,

accounts each partner is clothed with the right to insist that the partnership effects shall be first applied to the payment of the partnership debts; and this right will prevail over the claims of an alien or creditor of the copartner. So clearly defined is this right, so necessary to persons engaging in joint adventures of this kind—that it has been long and firmly settled that each partner has a lien on the effects, that they shall be applied primarily to the extinguishment of the partnership liabilities. This results naturally and necessarily from the nature of the enterprise, and of the title by which the property is held. The title is in the company, or association of individuals, and no one of the number has a separate ownership or right to any part or piece of the property or effects of the partnership. And the lien goes further than this. After the debts are all paid, each partner has a lien on the remaining partnership effects, for any balance due him upon a proper accounting together."[5] Further it seems that even a claimant through any member of the firm of a share in the partnership property may assert this lien.[6]

9 S. E. 432; Scott v. Kenan, 94 N. Car. 296; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Seibricht v. Rohrkasse, 3 Ohio Dec. (Reprint) 43, 2 Wkly. L. Gaz. 257; Moffatt v. Thomson, 5 Rich. Eq. (S. Car.) 155, 57 Am. Dec. 737; Boyce v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Lane v. Jones, 9 Lea (Tenn.) 627; Fain v. Jones, 3 Head (Tenn.) 308; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; White v. Dougherty, Mart. & Y. (Tenn.) 309, 17 Am. Dec. 802; Furman v. Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939; Rogers v. Nichols, 20 Tex. 719; Johnston v. Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580; Wm. W. Kendall Boot & Shoe Co. v. Johnston (Tex. Civ. App.), 24 S. W. 583; Charleson v. McGraw, 3 Wash. Ter. 344; Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114. And compare Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696; White v. Woodward, 8 B. Mon. (Ky.) 484; Whitworth v. Patterson, 6 Lea (Tenn.) 119; Robinson v. Allen, 85 Va. 721, 8 S. E. 835.

[5] Warren v. Taylor, 60 Ala. 218 (1877). See also 1 Story Eq. Jur. 677; Cannon v. Copeland, 43 Ala. 201; Andrews v. Keith, 34 Ala. 722; Parsons on Part., 265, 351, 505.

[6] Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. 870; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Warren v. Taylor, 60 Ala. 218; Whitmore v. Shiverick, 3 Nev. 288;

The law regards with favor this inchoate right which, although undoubtedly capable of waiver and alienation,[7] forbids, by its very nature, that any one member of the firm employ, without prior authorization, partnership assets in the matter of his own personal contracts.[8] A bona fide transferee for value, however,

Wade v. Rusher, 17 N. Y. Super. Ct. 537; Miller v. Price, 20 Wis. 117; In re Langmead, 7 DeG., M. & G. 353, (affg. 20 Beav. 20, 24 L. J. Ch. 589, 2 Jur. (N. S.) 1058, 3 W. R. 602); Croft v. Pyke, 3 P. Wms. 180; Cavander v. Bulteel, L. R. 9 Ch. 79, 43 L. J. Ch. 370, 29 L. T. 710, 22 W. R. 177. See further McCauley v. Fulton, 44 Cal. 355; Beecher v. Stevens, 43 Conn. 587; Frink v. Branch, 16 Conn. 260; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

[7] In re Kessler, 174 Fed. 906; Hart v. Clark, 54 Ala. 490; Jones v. Fletcher, 42 Ark. 422; West v. Chasten, 12 Fla. 315; Robertson v. Baker, 11 Fla. 192; Ladd v. Griswold, 4. Gilm. (Ill.) 25, 46 Am. Dec. 443; Parker v. Merritt, 105 Ill. 293; Goembel v. Arnett, 100 Ill. 34; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Williamson v. Adams, 16 Ill. App. 564; Trentman v. Swartzell, 85 Ind. 443; Clapp v. Adams, 143 Iowa 697, 121 N. W. 44; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Nix v. Menderson, 8 Ky. L. (abstract) 873; Bowman v. Spalding, 8 Ky. L. (abstract) 691, 2 S. W. 911; Giddings v. Palmer, 107 Mass. 269; Andrews v. Mann, 31 Miss. 322; Parish v. Lewis, Freem. Ch. (Miss.) 299; Rumsey-Sikemeier Co. v. Bank of Aurora, 139 Mo. App. 306, 123 S. W. 75; Tennant v. McKean, 46 Mo. App. 486; Alpaugh v. Savage (N. J.), 19 Atl. 380; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Vosper v. Kramer, 31 N. J. Eq. 420; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Dimon v. Hazard, 32 N. Y. 65; Westwood v. Cole, 66 Misc. (N. Y.) 53, 120 N. Y. S. 884; Cory v. Lone, 2 Sweeney (N. Y.) 491; Lassiter v. Stainback, 119 N. Car. 103, 25 S. E. 726; Seibricht v. Rohrkasse, 3 Ohio Dec. 43, 2 Wkly. L. Gaz. 257; Croone v. Bivens, 2 Head (Tenn.) 339; Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Willis v. Thompson, 85 Tex. 301, 20 S. W. 155; Ewing v. Osbaldiston, 2 Myl. & C. 53-88, 6 L. J. Ch. 161, 1 Jur. 50; In re Langmead, 7 DeG., M. & G. 353 (affg. 20 Beav. 20), 24 L. J. Ch. 589, 2 Jur. (N. S.) 1058); Lingen v. Simpson, 1 Sm. & St. 602, 24 R. R. 249; West v. Skip, 1 Ves. 456; Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237. And compare Holderness v. Shackels, 8 B. & C. 612, 3 M. & R. 25; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; McGown v. Sprague, 23 Ala. 524.

[8] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Kelley v. Greenleaf, 3 Story (U. S.) 93, Fed. Cas. No. 7657; Pierce v. Hickenburg, 2 Port. (Ala.) 196; Pierce v. Pass, 1 Port. (Ala.) 232; Nall v. McIntyre, 31 Ala. 532; Burwell v. Springfield, 15 Ala. 273; Feucht v. Evans, 52 Ark. 556, 13 S. W. 217; Filley v. Phelps, 18 Conn. 294; Yale v. Yale, 13 Conn. 185, 33 Am. Dec. 393; Edwards v. Entwisle, 2 Mackey (D. C.) 43; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628;

Clarke v. Farrell, 80 Ga. 622, 6 S. E. 20; Perry v. Butt, 14 Ga. 699; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373; Buchanan v. Meisser, 105 Ill. 638; Renfrow v. Pearce, 68 Ill. 125; Rainey v. Nance, 54 Ill. 29; McNair v. Platt, 46 Ill. 211; Casey v. Carver, 42 Ill. 225; Marine Co. v. Carver, 42 Ill. 66; Granger v. McGilvra, 24 Ill. 152; Brewster v. Mott, 5 Ill. 378; Harts v. Byrne, 31 Ill. App. 260; Newell v. Martin, 81 Iowa 238, 46 N. W. 1120; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Brewster v. Reel, 74 Iowa 506, 38 N. W. 381; Thomas v. Stetson, 62 Iowa 537, 17 N. W. 751, 49 Am. Rep. 148; Fletcher v. Anderson, 11 Iowa 228; Jackson v. Holloway, 14 B. Mon. (Ky.) 133; Bourne v. Wooldridge, 10 B. Mon. (Ky.) 492; Daniel v. Daniel, 9 B. Mon. (Ky.) 195; Black v. Bush, 7 B. Mon. (Ky.) 210; Jones v. Lusk, 2 Metc. (Ky.) 356; Bank of Kentucky v. Herndon, 1 Bush (Ky.) 359, 89 Am. Dec. 630; Johnson v. Hersey, 70 Maine 74, 35 Am. Rep. 303; Fall River Union Bank v. Sturtevant, 12 Cush. (Mass.) 372; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Roberts v. Pepple, 55 Mich. 367, 21 N. W. 319; Chase v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827; Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. 742; Stegall v. Coney, 49 Miss. 761; Buck v. Mosley, 24 Miss. 170; Minor v. Gaw, 11 Sm. & M. (Miss.) 322; Forney v. Adams, 74 Mo. 138; Hilliker v. Francisco, 65 Mo. 598; Price v. Hunt, 59 Mo. 258; Ackley v. Staehlin, 56 Mo. 558. See Flanagan v. Alexander, 50 Mo. 50; Croughton v. Forrest, 17 Mo. 131; Rock Island Implement Co. v. Sloan, 83 Mo. App. 438; Noble v. Miley, 20 Mo. App. 360; Banking House of Bartholow v. Harvey, 12 Mo. App. 588; Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 N. W. 165; Mecutchen v. Kennady, 27 N. J. L. 230; Geery v. Cockroft, 33 N. Y. Super. Ct. 146; Ward v. Higgins, 45 Hun (N. Y.) 588, 26 Wkly. Dig. 549, 9 N. Y. St. 641; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Hartness v. Wallace, 106 N. Car. 427, 11 S. E. 259; Evans v. Howell, 84 N. Car. 460; Norment v. Johnston, 32 N. Car. 89; Wells v. Mitchell, 23 N. Car. 484, 35 Am. Dec. 757; Grist v. Hodges, 14 N. Car. 198; Weed v. Richardson, 19 N. Car. 535; Corwin v. Suydam, 24 Ohio St. 209; Thomas v. Pennrich, 28 Ohio St. 55; Leonard's Exrs. v. Winslow, 2 Grant Cas. (Pa.) 139; Todd v. Lorah, 75 Pa. St. 155; McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512; Purdy v. Powers, 6 Pa. St. 492; Porter v. Miller, 32 Leg. Int. (Pa.) 283; Kutz v. Naugle, 7 Pa. Super. Ct. 179; Jones' Case, 1 Overt. (Tenn.) 455; Goode v. McCartney, 10 Tex. 193; Young v. Read, 25 Tex. (Sup.) 113; Powell v. Messer's Admr., 18 Tex. 401; Daugherty v. Haynes (Tex. Civ. App.), 28 S. W. 692; Wm. W. Kendall Boot & Shoe Co. v. Johnston (Tex. Civ. App.), 24 S. W. 583; Seaton v. Brooking, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1041; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Binns v. Waddill, 32 Grat. (Va.) 588; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539; Viles v. Bangs, 36 Wis. 131; Sauntry v. Dunlap, 12 Wis. 364. And compare Blair v. Harrison, 57 Fed. 257, 6 C. C. A. 326, affg. Claflin v. Bennett, 51 Fed. 693; Witherington v. Huntsman, 64 Ark. 551, 44 S. W. 74; Porter v. Miller,

is seemingly secure in his equitable rights,[9] and further a transferee with notice may undoubtedly on occasion successfully resist any demand that the subject-matter of the transfer be recovered back.[10] "The principle is well recognized, that where the individual creditor of a partner knowingly receives payment of his claim out of the partnership funds, it is, per se, a misappropriation of the assets of the firm to that extent, and it may be recovered back to answer partnership purposes. But it is equally clear that where such payment is made with the consent, express or implied, of the other partners, the latter would have no right to recover the money back to satisfy any demand they might have against the firm. And even conceding it might be recovered in their names, or in the name of the firm, for the use of the firm creditors, it is manifest that a suit in equity could not be maintained for such purpose without showing the insolvency of the firm, and that the money sought to be recovered was necessary for the payment of firm debts."[11]

32 Leg. Int. (Pa.) 283; Sanders v. Bush (Tex.), 39 S. W. 203. Ratification, however, will, as indicated, in more than one of the above cases, cure the infirmity of such a disposition of firm property.

[9] Duryea v. Burt, 28 Cal. 569; Harts v. Byrne, 31 Ill. App. 260; Ross v. Henderson, 77 N. Car. 170; Chipley v. Keaton, 65 N. Car. 534; Corwin v. Suydam, 24 Ohio St. 209. And compare Moriarty v. Bailey, 46 Conn. 592; Currier v. Bates, 62 Iowa 527, 17 N. W. 759.

[10] Perry v. Butt, 14 Ga. 699; Lassiter v. Stainback, 119 N. Car. 103, 25 S. E. 726; Evans v. Howell, 84 N. Car. 460; Carter v. Beaman, 51 N. Car. 44.

[11] Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373.

CHAPTER XIV

DUTIES AND LIABILITIES OF PARTNERS INTER SESE

SECTION

380. In general.
381. Good faith, a duty—When required.
382. Negligence.
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§ 380. **In general.**—It may seem, and even be, in some cases, superfluous, after a discussion of the rights of partners, to consider the question of the duties of partners, for, as a rule, the two are practically identical—the duty of a partner being simply one part of the whole partnership relation as between the partners themselves, the other part being the right of the other partner or partners to have the duty carried out. As an example, the duty of each partner to use the utmost good

faith to his copartners necessarily implies the right in each partner to require this good faith. However, even allowing the close and usual connection between rights and duties, and conceding that a demonstration of one usually proves the other, the subject is nevertheless treated under the different headings herein, at the risk of some repetition and perhaps a somewhat illogical and arbitrary classification, as some relations stand out more prominently from the standpoint of duty, and others from the standpoint of rights, and this arrangement gives the opportunity of treating each relation from the angle which is most apparent, and most easily appreciated.

§ 381. Good faith a duty—When required.—The supreme duty owing from each partner to his copartners is one which is included in every other duty, express[1] or implied,[2]—namely, the exercise of perfect good faith.[3] And in this particular in-

[1] Stipulated either in the original articles of association or in a subsequent agreement between the partners.

[2] From the partnership articles, subsequent agreement, nature of the business, sudden exigency, etc.

[3] "The first and highest duty which partners owe to each other is perfect good faith." Whitney v. Dewey, 158 Fed. 385. See further Bestor v. Barker, 106 Ala. 240, 17 So. 389; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Williamson v. Monroe, 101 Fed. 322; Miller v. O'Boyle, 89 Fed. 140; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Warren v. Schainwald, 62 Cal. 56; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Baker v. Cummings, 4 App. Cas. (D. C.) 230; Kilbourn v. Latta, 5 Mackey (D. C.) 304, 60 Am. Rep. 373; Stephens v. Orman, 10 Fla. 9; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777 (affd. 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47); Fordyce v. Schriver, 115 Ill. 530, 15 N. E. 87; Eldridge v. Walker, 80 Ill. 270; Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113; Yetzer v. Applegate, 83 Iowa 726, 50 N. W. 66; Parnell v. Thompson, 81 Kans. 119, 105 Pac. 502; Carlin v. Donegan, 15 Kans. 495; Phœnix Ins. Co. v. Miller, 13 Ky. L. (abstract) 464; Baldey v. Brackenridge, 39 La. Ann. 660, 2 So. 410; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459; Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Pomeroy v. Benton, 57 Mo. 531; Martin v. Lutkewitte, 50 Mo. 58; Croughton v. Forrest, 17 Mo. 131; Inglis v. Floyd, 33 Mo. App. 565; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959n; Coggswell & Boulter Co. v. Coggswell (N. J.), 40 Atl. 213; Nicholson v. Janeway, 16 N. J. Eq. 285; Renton v. Chaplain, 9 N. J. Eq. 62; Jes-

stance the words "partner" and "copartners" have a somewhat broader significance than ordinarily attaches to them since this absolute good faith required of actual partners is equally demanded of those who are negotiating for a partnership but between whom as yet the partnership relation does not exist,[4] and of those who have dissolved such relation but who have not entirely determined their partnership concerns.[5]

sup v. Cook, 6 N. J. L. 434; Platt v. Platt, 2 Thomp. & C. (N. Y.) 25-39 (affd. 58 N. Y. 646); Patterson v. Hare, 4 App. Div. 319, 38 N. Y. S. 565, 74 N. Y. St. 184; Wright v. Duke, 91 Hun (N. Y.) 409, 72 N. Y. St. 375, 36 N. Y. S. 853; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Yeoman v. Lasley, 40 Ohio St. 190; Stidger v. Reynolds, 10 Ohio 351; Devall v. Burbridge, 6 Watts & S. (Pa.) 529; Coursin's Appeal, 79 Pa. St. 220; Edwards v. Johnson, 90 S. Car. 90, 72 S. E. 638; Venable v. Levick, 2 Head (Tenn.) 351; Morris v. Wood (Tenn.), 35 S. W. 1013; Pierce v. Daniels, 25 Vt. 624; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Sexton v. Sexton, 9 Grat. (Va.) 204; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236; McMahon v. McClernan, 10 W. Va. 419. And compare Bentley v. Craven, 18 Bev. 75; Chapin v. Streeter, 124 U. S. 360, 31 L. ed. 475, 8 Sup. Ct. 529; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Hopkins v. Watt, 13 Ill. 298; Baldey v. Brackenridge, 39 La. Ann. 660, 2 So. 410; Heath v. Waters, 40 Mich. 457; Pomeroy v. Benton, 57 Mo. 531; Iman v. Inkster, 90 Nebr. 704, 134 N. W. 265; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Platt v. Platt, 2 N. Y. Super. Ct. 25; Sexton v. Sexton, 9 Grat. (Va.) 204; Burton v. Wookey, 3 Mad. & Geld. 367; Longstaff v. Keogh, 3 Victorian L. R. Eq. 175; Martin v. Smith, 11 Cent. Rep. 748; Kintrea v. Charles, 12 Grant Ch. (U. C.) 117; Rogers v. Ullmann, 27 Grant Ch. (U. C.) 137; O'Connor v. Naughton, 13 Grant Ch. (U. C.) 428. See also Aberdeen R. Co. v. Blakie, 1 Macq. H. L. 461; Longman v. Pole, M. & M. 223; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Brownell v. Steere, 29 Ill. App. 358 (affd. 128 Ill. 209, 21 N. E. 3); Wilder v. Morris, 7 Bush (Ky.) 420; Reynaud's Heirs v. Peytavin's Exrs., 13 La. 121; Struthers v. Pearce, 51 N. Y. 357.

[4] Lindley Partnership, *303; Bloom v. Lofgren, 64 Minn. 1, 65 N. W. 960; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Esmond v. Seeley, 28 App. Div. 292, 51 N. Y. S. 36; Densmore Oil Co. v. Densmore, 64 Pa. 43; Beene v. Rotan Grocery Co., 50 Tex. Civ. App. 448, 110 S. W. 162; Merchants' Bank v. Thompson, 3 Ont. R. Ch. Div. 541; Davidson v. Thirkell, 3 Grant Ch. (U. C.) 330; Hichens v. Congreve, 1 Rus. & M. 150. See further Lewis v. Loper, 54 Fed. 237; Emery v. Parrott, 107 Mass. 95; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Simons v. Vulcan Oil &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628. And compare the case of Uhler v. Semple, 20 N. J. Eq. 288, which holds that the rule of caveat emptor applies to persons bargaining with each other for a partnership.

[5] Gunn v. Black, 60 Fed. 151, 8 C. C. A. 534; Goldsmith v. Eichold, 94

§ 382. **Negligence.**—Negligence is always reprehensible in the eyes of the law and a partner who is negligent as regards any one of the affairs of the firm of which he is a member will ordinarily be held individually liable for the resulting loss.[6] Thus where a partnership is created for the purpose of purchasing, storing and selling eggs, those partners upon whom devolve the duty of keeping the eggs in their cold storage warehouse will be liable to their associates for the eggs which, through their neglect to exercise ordinary or reasonable care are spoiled.[7] So, also, the negligent paying of an unjust claim against the firm by one of the members thereof, will preclude his charging to the partnership the amount expended.[8] On the other hand although one of the partners neglects an attempt to enforce a claim until the same is barred by limitations, he will not be compelled to bear the entire loss when his associate had knowledge of the debt and might have himself brought suit thereupon within the prescribed time.[9] But where the vice-president of a bank is the manager of a partnership of

Ala. 116, 10 So. 80, 33 Am. St. 97; Pierce v. McClelland, 93 Ill. 245; Renfrow v. Pearce, 68 Ill. 125; Ehrmann v. Stitzel, 121 Ky. 751, 90 S. W. 275, 28 Ky. L. 728, 123 Am. St. 224; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. See further Clark v. Clark, 8 Victorian L. R. Eq. 303; Lewis v. Loper, 54 Fed. 237; Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 N. E. 132; Heward v. Slagle, 52 Ill. 336; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459; Wyman v. Hooper, 2 Gray (Mass.) 141; Heath v. Waters, 40 Mich. 457; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. 126 (affd. 59 N. Y. 659); McNair v. Ragland, 7 N. Car. 139; Wilson v. Keller, 195 Pa. St. 98, 45 Atl. 682; White v. Gardner, 37 Tex. 407.

[6] See § 356 on partner failing or refusing to perform services. Carlin v. Donegan, 15 Kans. 495; Gordon v. Moore, 8 Pa. Co. Ct. 289; Morris v. Wood (Tenn.), 35 S. W. 1013; Pierce v. Daniels, 25 Vt. 624.

[7] Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840.

[8] Gordon v. Moore, 134 Pa. St. 486, 19 Atl. 753.

[9] Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395. See also Aiken v. Ogilvie, 12 La. Ann. 353; Walpole v. Renfroe, 16 La. Ann. 92; Knipe v. Livingston, 209 Pa. 49, 57 Atl. 1130. And compare Jessup v. Cook, 6 N. J. L. 434.

which the bank is a member, his failure to properly manage the partnership business can not be charged to the bank when the latter sues to recover money loaned to the firm.[10] And it is held that a partner who merely neglects his duty to the firm does not forfeit his rights to share in its assets, unless there is an agreement to that effect.[11]

§ 383. **Bad judgment.**—Before proceeding further, however, it may be well to note that the law does not demand of partners that each of their several acts shall be a source of profit to the company. Consequently, mere lack of discretion or good judgment on the part of a member of the firm will not necessarily throw the resulting loss upon him alone, where he acts in good faith.[12] And if he makes a mistake in the payment of an account, the loss is the firm's.[13] And the partner who innocently and legitimately employs an unprofitable servant, need not, so it has been held, sustain the entire loss occasioned by the acts which should otherwise have had a lucrative termination.[14] On the other hand, when, as a result of the articles of partnership, one partner must perform certain duties, and he chooses to palm them off upon his employé, the dilatory member of the firm must as to his co-members bear the responsibility for any untoward results that may follow this unempowered delegation of authority.[15]

[10] Cameron v. First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334 (affd. 34 S. W. 178).

[11] Inman v. Inkster, 90 Nebr. 704, 134 N. W. 265.

[12] Lyles v. Styles, 2 Wash. (U. S.) 224, Fed. Cas. No. 8625; Northen v. Tatum, 164 Ala. 368, 51 So. 17; Hall v. Sannoner, 44 Ark. 34; Poole v. Koons, 252 Ill. 49, 96 N. E. 556; Snell v. De Land, 136 Ill. 533, 27 N. E. 183; Fordyce v. Shriver, 115 Ill. 530, 5 N. E. 87; Morrison v. Smith, 81 Ill. 221; Savery v. Thurston, 4 Ill. App. 55; Exchange Bank v. Gardner, 104 Iowa 176, 73 N. W. 591; Charlton v. Sloan, 76 Iowa 288, 41 N. W. 303; Jessup v. Cook, 6 N. J. L. 434; Morris v. Allen, 14 N. J. Eq. 44; Paterson v. Burton, 3 N. J. L. 717; Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. S. 827; Caldwell v. Leiber, 7 Paige (N. Y.) 483; McCrae's Admrs. v. Robeson, 6 N. Car. 127; Lyons v. Lyons, 207 Pa. 7, 56 Atl. 54, 99 Am. St. 779; Peters v. McWilliams, 78 Va. 567.

[13] Tillotson v. Paquet (Ore.), 145 Pac. 268.

[14] Aiken v. Ogilvie, 12 La. Ann. 353.

[15] Einstein v. Schnebly, 89 Fed. 540.

§ 384. **Fraud as to firm or copartner.**—It follows a priori from the general requirement of good faith in partnership dealings, that a partner is not allowed to gain any advantage over a copartner by fraud, misrepresentation or concealment, and for any advantage so obtained he must account to the copartner.[16] It was held there was fraud where one partner, a long and intimate friend of the other, who was inexperienced, threatened to withdraw from the management of the business of which he had entire charge, and falsely represented that the other had an unfair advantage in the partnership agreement, and valuable concessions obtained by such fraud were set aside.[17] This rule was applied where one partner agreed to sell the firm property at a certain price, and fraudulently represented to the firm that he could get only a smaller price, obtained from the partners a blank contract of sale, filled in his name and resold to the purchaser he had secured.[18] It was held in one case to be a fraud on nonconsenting members for a partner to use a firm note to pay his individual debt.[19] There was fraud where one partner represented the purchase-price of land he had bought for the firm to be greater than its actual cost, and retained the difference himself.[20] And partners who caused the foreclosure of a mortgage on firm property, with the purpose of defrauding a copartner, were liable to him, though the mortgagee was an innocent tool in their hands.[21] A managing partner will not be allowed to take advantage of his position to defraud a copartner.[22] Where one partner, to defraud his copartner, induced a creditor to obtain a judgment against the firm, in consequence of which its assets were sold

[16] See preceding sections this chapter. Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4; Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948.

[17] Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652.

[18] Zahn v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591.

[19] Towle v. Dunham, 76 Mich. 251, 42 N. W. 1117.

[20] Chilton v. Groome (N. Car.), 84 S. E. 1038.

[21] Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63.

[22] Breyfogle v. Bowman, 157 Ky. 62, 162 S. W. 787.

at receiver's sale, at which the defrauding partner bought them, he is held to hold the assets for the firm's benefit.[23] However, it has been held not fraud per se for partners through a third person to buy the interest of a copartner, concealing the fact that the purchase was for them.[24] A sale of partnership property by a partner to his brother for less than a third of its value is fraudulent as to a partner who did not know of the sale.[25] It is fraud for one partner, sole manager of the business, in a settlement between members of a firm, to overstate the amount of money advanced by him, and understate the amounts advanced by the copartner, this whether the managing partner knew the statements to be untrue, or being ignorant of the real facts, assumed to know them and where the copartner had great confidence in him, he was not negligent in relying on his representations, though he had access to the books.[26] It is a misappropriation of partnership assets for one partner to turn in to the firm the price of a farm as $80 per acre when in fact he paid $75, and the firm sold it to the copartner at a profit over $80.[27]

§ 385. **Duty to conform to partnership agreement.**—The most obvious duty perhaps pertaining to the partnership relation, which devolves upon each member of the firm is the obligation to conform in general to every provision of the partnership agreement, whether it be written or oral, express or implied, from the usual course of the business or otherwise. This duty arises, not so much perhaps on account of any rule peculiar to the law of partnership relations, but from the general and universal law of contracts. There are, of course, exceptions to this general principle, as, for instance, where one partner, by his own wrongdoing, makes it impossible for his copartner to carry out his contractual relations, or, possibly, where,

[23] Weinstein v. Welden, 80 Misc. (N. Y.) 348, 142 N. Y. S. 406.

[24] Appeal of Geddes, 80 Pa. St. 442.

[25] Patterson v. Hare, 4 App. Div. 319, 38 N. Y. S. 565, 74 N. Y. St. 184.

[26] Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769.

[27] Smith v. Hart, 179 Ill. App. 98.

through legal or physical conditions of the firm, certain duties can not be performed, but, as a whole, the principle as above set forth is too plain and too well grounded in our law to invite criticism or to require an extended discussion. Conformance with the partnership articles devolves upon all the partners, and their acts must be such as are within the prescribed confines of the partnership business.[28] Thus a partner who has disposed of firm property in violation of the partnership agreement must bear the burden of damages resulting therefrom.[29] Again where joint owners of a sawmill plant tortiously and wrongfully enter upon the partnership premises on a Sunday when the other joint proprietor is absent, and remove therefrom certain important parts of the machinery essential to the operation of the mill, and carry them away for the express purpose of preventing the latter from operating the mill and keep them away for more than a month during which time the mill is idle, their associate is entitled to actual and punitive damages commensurate with his loss and injury.[30]

§ 386. **Construction of partnership agreement.**—The ordinary rules for the construction of contracts in general apply to the construction of articles of partnership.[31] This is especially true where the question as to partnership arises between the partners themselves, and not between third parties and the firm.[32] When the terms of the partnership agreement are

[28] Weeks v. McClintock, 50 Ark. 193, 6 S. W. 734; Haller v. Willamowicz, 23 Ark. 566; Leighton v. Hosmer, 39 Iowa 594; Murrell v. Murrell, 33 La. Ann. 1233; Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519; Phillips v. Reeder, 18 N. J. Eq. 95; Herrick v. Ames, 21 N. Y. Super. Ct. 115; Tarbell v. West, 13 N. Y. Wkly. Dig. 314; Hulett v. Fairbanks, 40 Ohio St. 233; McCoy v. Crossfield, 54 Ore. 591, 104 Pac. 423; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133; Gill v. Wilson, 2 Willson Civ. Cas. Ct. App. (Tex.), § 380; Campbell v. Campbell, 7 Cl. & F. 166.

[29] Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. S. 372.

[30] Ball v. Levin, 48 La. Ann. 359, 19 So. 118. See also Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

[31] Bird v. Hamilton, Walk. Ch. (Mich.) 361.

[32] Bird v. Hamilton, Walk. Ch. (Mich.) 361.

placed in writing, the written articles are presumed to contain all the stipulations and conditions of the partnership.[33] If the provisions of the contract are plain and explicit, unambiguous, and there is nothing which would violate the duty of good faith owing by each partner to his associate, the contract will be enforced as written.[34] The written contract will be construed as a whole.[35] The general rule, when the contract is not perfectly plain, is so to construe it as to carry out the intent of the parties.[36] It should be construed according to the manifest intention of the parties, and this must be determined by the contract itself and the surrounding circumstances.[37] If the terms of the agreement are ambiguous, the construction followed by the parties will control. This rule was applied where the articles apparently limited the interest of one partner to a share in profits, but the parties had allowed each a share in the capital,[38] and where it was uncertain from the articles whether a partner's personal taxes should be charged to the firm.[39] Even if not ambiguous, it has been held that the circumstances surrounding its execution and the subseqent acts of the parties may be looked to in order to discover their intentions.[40] Alterations in or constructions of the agreement acquiesced in by all partners for many years and evidenced by the books, should

[33] Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Boardman v. Close, 44 Iowa 428.

[34] Lingen v. Simpson, 1 Sm. & S. 600; Akhurst v. Jackson, 1 Swanst. 85.

[35] Smith v. Rainey, 209 U. S. 53, 52 L. ed. 679, 28 Sup. Ct. 474.

[36] Simonton v. Sibley, 122 U. S. 220, 30 L. ed. 1225, 7 Sup. Ct. 1351; Black v. Ostrander, 1 Colo. App. 272, 28 Pac. 723; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; Louisiana Nat. Bank v. Scott, 42 La. Ann. 785, 7 So. 720; Funck v. Haskell, 132 Mass. 580; Grant v. Bryant, 101 Mass. 567; Dunnell v. Henderson, 23 N. J. Eq. 174; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Hayes v. Fish, 36 Ohio St. 498; Smith v. Ewing, 151 Pa. St. 256, 25 Atl. 62; White v. Magann, 65 Wis. 86, 26 N. W. 260; Walker v. Harris, Anstr. 245; Cooke v. Benbow, 3 DeG., J. & S. 1; Mead v. O'Keefe, 15 Ont. 84.

[37] Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363. See Spears v. Willis, 151 N. Y. 443, 45 N. E. 849.

[38] Rathbun v. McConnell, 27 Nebr. 239, 42 N. W. 1042.

[39] Snyder v. Seaman, 2 App. Div. 258, 37 N. Y. S. 696, 73 N. Y. St. 137. See also Causten v. Barnette, 49 Wash. 659, 96 Pac. 225.

[40] Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319.

be given great weight.[41] It has been held that courts of equity will consider all stipulations in the articles not acted on by the parties as if they did not exist.[42] But the neglect or refusal of a partner to perform duties required under an oral agreement is not an abandonment of the contract, when afterward written articles embodying the same terms as the oral agreement were executed.[43]

§ 387. Duty to devote time and skill to business.—It is customary, and in actual practice very advisable, for the partners, in their articles or agreement of partnership, to stipulate concerning the services of each partner, but a partner can not evade his duty to give his best time and skill to the partnership business by refusing or neglecting to make any provision concerning the same in his agreement, as the law implies an agreement that he shall reasonably devote his time and energy to the business unless expressly stipulated against.[44] Unless there is an agreement permitting, a partner is not allowed to devote himself to interests which may take his attention from partnership business, or affect his own credit and thereby that of the firm.[45] "No partner has a right to engage in any business which must necessarily deprive the partnership of a portion of his skill, industry or capital, which he is bound to devote to the partnership. Where there are no covenants, a man may engage in as many partnerships as he pleases, provided he does not violate the above principle."[46] Partners injured by the failure of a partner to devote his time to the business may ask an injunction, bring action for damages or seek to dissolve the partnership.[47] However, a partner in transacting firm busi-

[41] Appeal of Southmayd (Pa.), 8 Atl. 72, 5 Sad. 1.

[42] Boyd v. Mynatt, 4 Ala. 79.

[43] Burgess v. Badger, 124 Ill. 288, 14 N. E. 850.

[44] Moynihan v. Drobaz, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. 46; Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839.

[45] Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Dean v. McDavell, 8 Ch. D. 345.

[46] Caldwell v. Leiber, 7 Paige (N. Y.) 483.

[47] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201.

ness is required to use only reasonable care, skill, diligence and economy, such as an ordinarily prudent business man would use in similar transactions.[48] He is not held to the use of as high degree of skill as he is of good faith. He is not liable for loss caused by an honest error of judgment.[49] Nor is he chargeable for lack of discretion or good judgment, if his act has not been wantonly negligent or fraudulent.[50]

§ 388. Duty to keep partnership accounts.—We have seen, under the discussion of rights of partners, that every partner has a right to inspect partnership accounts and to require that they be kept correctly. It is equally true that he must himself keep accounts of such firm business as he may transact which requires accounts, and must in turn concede his copartner access thereto. A complete discussion of the subject is not given here, since the principles applicable hereto are fully covered under the heading of Accounting. This topic is of such importance, and is governed by such a wide range of decisions and legal rules as to make it advisable to allot to it a separate chapter.[51]

§ 389. Duty not to secure personally benefits rightfully belonging to firm.—Good faith will not permit any one partner to advantage himself, singly and alone, at the expense of the firm.[52] "The law imposes upon each partner the duty of

[48] Morris v. Wood (Tenn.), 35 S. W. 1013.

[49] Exchange Bank v. Gardner, 104 Iowa 176, 73 N. W. 591; Savery v. Thurston, 4 Ill. App. 55; Tygart v. Wilson, 39 App. Div. 58, 56 N. Y. S. 827.

[50] Charlton v. Sloan, 76 Iowa 288, 41 N. W. 303; Fordyce v. Shriver, 115 Ill. 530, 5 N. E. 87; Knipe v. Livingston, 209 Pa. 49, 57 Atl. 1130.

[51] See ch. 21 infra.

[52] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Chapin v. Streeter, 124 U. S. 360, 31 L. ed. 475, 8 Sup. Ct. 529; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Philips v. Crammond, 2 Wash. (U. S.) 441, Fed. Cas. No. 11092; Kelley v. Greenleaf, 3 Story (U. S.) 93, Fed. Cas. No. 7657; In re Clap, 2 Lowell (U. S.) 168, Fed. Cas. No. 2783; Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; McKenzie v. Dickinson, 43 Cal. 119; Laf-

exercising toward his copartner the utmost integrity and good faith in all partnership affairs. In transactions concerning the interests of the firm he must consider their mutual welfare,

fan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Grafton v. Paine, 7 App. D. C. 255; Sanderson's Admrs. v. Sanderson, 17 Fla. 820; Solomon v. Solomon, 2 Ga. 18; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Wierich v. DeZoya, 2 Gilm. (Ill.) 385; Smith v. Ramsey, 1 Gilm. (Ill.) 373; Stearnes v. Joy, 41 Ill. App. 157; Love v. Carpenter, 30 Ind. 284; Lonergan v. Lonergan, 60 Kans. 855, 55 Pac. 851; Axton v. Kentucky Bottlers Supply Co., 159 Ky. 51, 166 S. W. 776; McAdams' Exrs. v. Hawes, 9 Bush (Ky.) 15; Anderson's Admr. v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Farmer v. Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Klotz v. Macready, 39 La. Ann. 638, 2 So. 203; Lowry v. Cobb, 9 La. Ann. 592; Bush v. Guion, 6 La. Ann. 797; Tebbetts v. Dearborn, 74 Maine 392; Leach v. Leach, 18 Pick. (Mass.) 68; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Gordon v. Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Brown v. Schackelford, 53 Mo. 122; Evans v. Gibson, 29 Mo. 223, 77 Am. Dec. 565; Croughton v. Forrest, 17 Mo. 131; Catron v. Shepherd, 8 Nebr. 308, 1 N. W. 204; Brown v. O'Brien, 4 Nebr. 195; Tucker v. Peaslee, 36 N. H. 167; Coddington v. Idell, 30 N. J. Eq. 540; Todd v. Rafferty's Admrs., 30 N. J. Eq. 254; Partridge v. Wells, 30 N. J. Eq. 176; Shaler v. Trowbridge, 28 N. J. Eq. 595; Eason v. Cherry, 59 N. Car. 261; Baird v. Baird, 21 N. Car. 524, 31 Am. Dec. 399; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Getty v. Devlin, 54 N. Y. 403; Adams v. Outhouse, 45 N. Y. 318; Anderson v. Lemon, 8 N. Y. 236, Seld. Notes (N. Y.) 90; Struthers v. Pearce, 51 N. Y. 357; Chamberlin v. Chamberlin, 44 N. Y. Sup. Ct. 116; Weston v. Ketcham, 39 N. Y. Super. Ct. 54; Dougherty v. Van Nostrand, 1 Hoff. (N. Y.) 68; Swift v. Dean, 6 Johns. (N. Y.) 523; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Tolan v. Carr, 12 Daly (N. Y.) 520; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. (N. Y.) 126 (affd. 59 N. Y. 659); Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. S. 285; Mitchell v. Read, 61 Barb. (N. Y.) 310; American Bank Note Co. v. Edson, 56 Barb. (N. Y.) 84, 1 Lans. (N. Y.) 388; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Case v. Abeel, 1 Paige (N. Y.) 393; Reis v. Hellman, 25 Ohio St. 180; Lacy v. Hall, 37 Pa. St. 360; Bennett v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; In re Johnson's Appeal, 115 Pa. St. 129, 8 Atl. 36, 2 Am. St. 539; In re Raiguel's Appeal, 80 Pa. St. 234; In re Coursin's Appeal, 79 Pa. St. 220; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Lefever v. Underwood, 41 Pa. St. 505; Coder v. Huling, 27 Pa. St. 84; Seibert v. Seibert, 1 Brewst. (Pa.) 531; Whitman v. Bowden, 27 S. Car. 53, 2 S. E. 630; Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133;

rather than his own private benefit."[53] And the rule is thus expressed in the Uniform Partnership Act: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representative of the last surviving partner."[54] This rule has been carried to a point where it has been held that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, a partner in whose hands the profits are can not refuse to account for and divide them on the ground of the illegal character of the contract.[55] Thus a partner who secretly purchased and sold land contemplated as part of the partnership undertaking, must account for the profits.[56] One who retains one of certain farms purchased for the business,[57] or one who organizes a selling agency for the firm product, must account to his copartners for the secret profits thus made out of the firm business.[58]

Henson v. Byrne (Tex. Civ. App.), 41 S. W. 494; Penniman v. Munson, 26 Vt. 164; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Forrer v. Forrer's Exrs., 29 Grat. (Va.) 134; McMahon v. McClernan, 10 W. Va. 419; Aas v. Benham (1891), 2 Ch. 244, 19 Eng. Ruling Cas. 582; Carter v. Horne, 1 Eq. Cas. Abr. 7, par. 13; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298. And compare Rogers v. Riessner, 30 Fed. 525; Watts v. Patton, 66 Miss. 54, 5 So. 628; Otis v. Sill, 8 Barb. (N. Y.) 102; Babb v. Mosby, 7 Lea (Tenn.) 105; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150. See further Anderson's Admr. v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Attaway v. St. Louis Third Nat. Bank, 15 Mo. App. 578; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631; De Leon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101.

[53] Holmes v. Darling, 213 Mass. 303, 100 N. E. 611.

[54] Uniform Partnership Act, § 21.

[55] Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732.

[56] Kyle v. Griffin (W. Va.), 85 S. E. 559.

[57] Cole v. Hayutin, 109 Ark. 617, 160 S. W. 1084.

[58] Hurst v. Brennen, 239 Pa. 231, 86 Atl. 783.

§ 390. Purchase by partner of claim or title against partnership or partner.—In general, a partner can not possess himself individually, at least for purposes of profit, of claims against the partnership.[59] "Under supposable circumstances, it may be that in equity a partner, who had taken assignments of the obligations of the firm to himself, would be permitted to keep them alive and enforce them against his copartners for their contributive share of the sums which he had paid for the assignment. This might be done for the purpose of giving him the benefit of securities incident to the debts, when necessary to the doing of justice between the partners, if it could be done without injury to any creditor of the firm, but it is manifest, upon the plainest principles of equity and fair dealing, that a member of a business firm can not be permitted to make a profit for himself by purchasing the obligations of the firm at a discount, or by keeping them alive at interest; and if permitted, under any circumstances, to enforce the obligations so purchased, it can only be for the amount paid by him in taking them up, and lawful interest thereon if contribution by his copartners shall have been unreasonably delayed."[60] In more than one instance, the purchase by a partner for his own personal benefit of a claim against the firm of which he is a member has been declared equivalent to payment of the same.[61] "That a sale and transfer of an obligation of a partnership to one of the members operates as a payment, under ordinary circumstances, results necessarily from the relation of the purchaser to his copartners, and from the fact of his being himself a principal debtor."[62] And a partner's acquisition for private gain of an

[59] Eston v. Strother, 57 Iowa 506, 10 N. W. 877; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 8 L. R. A. (N. S.) 618n, 135 Am. St. 934.

[60] Coleman v. Coleman, 78 Ind. 344. See also Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674.

[61] Edison Electric Illuminating Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Booth v. Farmers' &c. Nat. Bank, 74 N. Y. 228; Chapin v. Clemitson, 1 Barb. (N. Y.) 311; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

[62] Coleman v. Coleman, 78 Ind. 344.

adverse title or interest in the partnership property will avail him nothing.[63] The purchase by a partner at a judicial sale of land sold on a foreclosure of a partnership lien, gives him title, and does not inure to the benefit of the firm.[64] And a partner who purchased an oil and gas lease for himself and his copartner as partners and was directed by the copartner to transfer a part interest in his share to an outside person, could, after that transfer, purchase the interest of that third person without violating his duty to his copartner.[65] "The purchase by one partner with his own means of an individual judgment against another partner at a time when no funds had arisen out of which the latter was entitled to claim profits is outside of the scope of the partnership business; and, whatever view may be taken of such transactions from the standpoint of propriety," there is no rule of law which forbids it.[66]

§ 391. Diversion of profits from copartner.—Further, it seems that the attempt of any one partner to so change a partnership deal as to eliminate his copartner's right to share in the fruits of the contract will avail him nothing.[67] Thus where certain members of a partnership, upon receiving word that the

[63] Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385; Miller v. O'Boyle, 89 Fed. 140; Croswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777 (affd. 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47); Goodwin v. Smith, 144 Ky. 41, 137 S. W. 789; Anderson v. Lemon, 8 N. Y. 236, Seld. Notes (N. Y.) 90; Weston v. Ketcham, 39 N. Y. Super. Ct. 54; Eakin v. Shumaker, 12 Tex. 51; Washburn v. Washburn, 23 Vt. 576; Forrer v. Forrer's Exrs., 29 Grat. (Va.) 134; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934. See further Zimmerman v. Huber, 29 Ala. 379; Wierich v. DeZoya, 2 Gilm. (Ill.) 385; Farmer v. Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Gordon v. Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70. And compare Baird v. Baird, 21 N. Car. 524, 31 Am. Dec. 399.

[64] Evans v. Carter (Tex. Civ. App.), 176 S. W. 749.

[65] Goodwin v. Smith, 144 Ky. 41, 137 S. W. 789.

[66] Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934. See also McKenzie v. Dickinson, 43 Cal. 119.

[67] Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714. See further Miller v. O'Boyle, 89 Fed. 140; Pearce v. Sutherland, 164 Fed. 609, 90 C.

firm is to be awarded a second contract which it has been attempting to obtain through a satisfactory execution of its first contract, write to other of the partners dissolving the partnership, profits accruing to the former under the second contract which they then personally obtain must be shared with their one-time associates, or if the dissolution be regarded as valid such profits may be made the basis of a suit for damages.[68] So also diverted profits under the original contract will be charged against the member of a real estate firm who, after consummating a sale of land listed with his company, abandons the same pursuant to an agreement he has made with the purchaser and thereafter sells to the latter land to which he individually holds title.[69] But where one partner complains of the quality of apples shipped by his copartner from a certain orchard and tells him if he can not get better apples, not to ship to him, but to buy himself and keep the profit, such complaining partner has no right to an accounting in the transactions after the copartner buys and sells the apples.[70] And where a partner through his own fault does not participate in the duties of the partnership, he can not demand an equal share of the profits realized by his copartner upon his individual contract.[71]

§ 392. **Secret use of partnership funds.**—The clandestine use by an individual member of a firm of partnership funds or property in his own private speculations, is inconsistent with the fundamental requirement of good faith.[72] "When a co-

C. A. 519; Williamson v. Monroe, 101 Fed. 322; Chambers v. Mittnacht, 23 S. Dak. 449, 122 N. W. 434.

[68] Williamson v. Monroe, 101 Fed. 322. And see Axton v. Kentucky Bottlers Supply Co., 159 Ky. 51, 166 S. W. 776.

[69] Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113. Compare also White v. Jouett, 147 Ky. 197, 144 S. W. 55.

[70] House v. Linn, 179 Ill. App. 114.

[71] Grafton v. Paine, 7 App. D. C. 255.

[72] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; McGahey v. Oregon King Min. Co., 165 Fed. 86; Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135; Deaner v. O'Hara, 36 Colo. 476, 85 Pac. 1123; Solomon v. Solomon, 2 Ga. 18; Pomeroy v. Benton, 57 Mo. 531; Brown v. Schackelford, 53 Mo. 122; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Holden

partner undertakes to apply the assets of the firm to his individual debt, he is going beyond the scope of his authority as the agent of the firm, and his acts are void, and pass no title to the property, as against the firm or creditors of the firm, unless consent of the other copartners to such transaction is shown."[73] "A partner has no right to deal with partnership property other than for the sole benefit of the partnership."[74] "It seems to be well settled by the cases, and to rest upon unquestionable principles of public policy, that if one partner clandestinely uses the partnership funds or property in his own private speculations, he must account, not only for the funds or property so employed, but also for the profits realized by the transaction."[75] But "to constitute a case of fraud the funds must have been abstracted, not only without the consent of the other partners, but * * * secretly, as by a false entry upon the books, or by the omission to make any entry at all."[76] This rule does

v. Thurber (R. I.), 72 Atl. 720. And compare McKenzie v. Dickinson, 43 Cal. 119; Rouquette v. Ryan, 10 Ky. L. 503, 8 S. W. 702.

[73] Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

[74] Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219. "It would be against the plainest principles of justice and equity, * * * to permit a partner to use partnership funds in paying for and improving property for the benefit of his wife, and hold that there was no charge or lien upon the property in favor of the partnership to the extent that partnership funds had been so used and unaccounted for—especially since it appeared that the partnership assets were insufficient to pay its debts and the burden of paying them would fall upon the surviving partner." Brown v. Orr, 110 Va. 1, 65 S. E. 499, 135 Am. St. 912. Contra: "Each partner combines in himself at once the character of principal and agent, and may possess and dispose of its [the partnership's] funds and property, even to the extent of appropriating them to his own use, by withdrawing them from the common fund." But this rule does not apply in a case where an agreement to form a partnership has been entered into and one prospective partner has delivered funds into the hands of his intended associate, but the agreement has never been executed. State v. Brown, 38 Mont. 309, 99 Pac. 954.

[75] Love v. Carpenter, 30 Ind. 284.

[76] In re Hamilton, 1 Fed. 800, citing Ex parte Smith, 1 Glyn & J. 74, in which it was held "that if one partner be entrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud, which will entitle the joint estate to prove

not apparently obtain, however, when the partner of one who has withdrawn partnership funds and charged himself therewith on the books of the firm, lives at a great distance from the place where the books are kept and is without access to them, and can not readily, by reason of the distance separating him from the scene of the application of the funds, have any extrinsic knowledge of their conversion.[77] Moreover a partner who frequently overdraws from a certain deposit in violation of the articles of association can not predicate fraud on the fact that his copartner frequently does the same thing.[78] But it has been held that the "sale" by a partner to himself of firm property is absolutely void, and his "transfer" of the title thereby will avail him nothing.[79] It has been held that where a partner incurred a debt to secure money to buy land, and afterward paid the debt with partnership funds, the partnership has no claim on the land.[80]

§ 393. Use of influence or information.—Any gratuity paid a partner for his influence in securing the execution of a firm contract will usually inure to the benefit of the partnership as a whole.[81] So while knowledge or information, which belongs to the firm in the sense that it is available or useful for a purpose within the scope of the partnership business, may be employed by a single partner to further his own private interests in a transaction wholly without the scope of the firm business and not in competition with it,[82] profit resulting from the use

against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it."

[77] Hunt v. Benson, 2 Humph. (Tenn.) 459.

[78] Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045.

[79] Comstock v. Buchanan, 57 Barb. (N. Y.) 127 (affd. 57 Barb. (N. Y.) 146).

[80] Hengy v. Hengy (Tex. Civ. App.), 151 S. W. 1127.

[81] Newell v. Cockran, 41 Minn. 374, 43 N. W. 84; Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Esmond v. Seeley, 28 App. Div. 292, 51 N. Y. S. 36; Short v. Stevenson, 63 Pa. St. 95; Whitman v. Bowden, 27 S. Car. 53, 2 S. E. 630; Grant v. Hardy, 33 Wis. 668. See further Gleason v. Chicago, M. & St. P. R. Co. (Iowa), 43 N. W. 517.

[82] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; McGahey v. Oregon King Min. Co., 165 Fed. 86; Aas v. Benham (1891), 2

of such knowledge or information in an undertaking which transgresses these bounds belongs to all those composing the partnership and not to the designing partner individually.[83] "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business."[84]

§ 394. Renewing firm lease or other contract in individual name.—It has been well settled that a partner holds for the firm all leases, contracts or other things, received by him personally, and which came through his connection with the firm, and which, on account of their nature or the circumstances surrounding the transaction, should belong to the firm. His possession and control is that of the firm and he can do nothing to exclude copartners from possession or control. Along this line it has been held that a partner can not renew a lease held by the firm, in his own name and for his own use (in the absence of an agreement thereto by the partners), but that the lease is held by him for the benefit of the partnership.[85] And

Ch. 244, 65 L. T. 25. See further Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Armstrong v. Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136.

[83] McGahey v. Oregon King Min. Co., 165 Fed. 86; Galbraith v. Devlin, (Wash.), 148 Pac. 589. See further Dean v. Macdowell, 8 Ch. Div. 345; Cassels v. Stewart, 6 App. Cas. 64; Dusenberry v. Horning, 56 Ore. 210, 106 Pac. 1019; Sexton v. Sexton, 9 Grat. (Va.) 204.

[84] Aas v. Benham (1891), 2 Ch. 244, 65 L. T. (N. S.) 25. Quoted with approval in Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201.

[85] Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; Lurie v. Pinanski, 215 Mass. 229, 102 N. E. 629; Struthers v. Pearce, 51 N. Y. 357; Betts v. June, 51 N. Y. 274; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869n; Johnston's Appeal,

this rule has at times been carried so far that[86] the court held that a renewal of a lease by a partner in his own name, even though the lease was at will and the renewing partner notified his partners of his intention to so renew the lease, and that before the end of their term, was to be held as for the use of the firm, and not for the partner individually who so renewed it. It is difficult to see the reason for applying the rule to this case, and the great majority of the cases undoubtedly do not go to this extent in the application of the rule. It matters not whether or not there is any provision in the lease for a renewal. The necessity for the utmost good faith between the partners makes it imperative that no one partner can secure a renewal of the lease for his own use, to the exclusion of his partners.[87] In case there has already been a dissolution, and an expiration of the lease and no fraud or secret dealing, a partner may properly renew a lease for his own use and benefit.[88] And it is held that one member of a partnership during its existence can not, without the knowledge of his copartner, take a renewal for his own benefit of a lease of premises leased by the firm, though the renewal lease would not begin until after the partnership had expired by limitation, and he is held to account for the value of such lease.[89] So if one partner leases property necessary for firm business, in his own name, he holds it as trustee for the firm;[90] and the same rule applies where one partner secretly purchases premises which the firm occupy, while the other partner as agent for the firm is openly negotiating with the owner for their purchase.[91] If, however, one partner actually holds a lease, both legally and equitably, although perhaps the firm

115 Pa. St. 129, 8 Atl. 36, 2 Am. St. 539; Clements v. Hall, 2 DeG. & J. 173, 27 L. J. Ch. 349; Alder v. Fouracre, 3 Swanst. 489; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298.

[86] Clegg v. Edmondson, 4 DeG., M. & G. 787.

[87] Spiess v. Rosswog, 63 How. Pr. 401, 48 N. Y. Super. Ct. 135 (affd. 96 N. Y. 651).

[88] Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; American Bank Note Co. v. Edson, 56 Barb. (N. Y.) 84, 1 Lans. (N. Y.) 388.

[89] Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252.

[90] Dikis v. Likis, 187 Ala. 218, 65 So. 398.

[91] Donleavey v. Johnston, 25 Cal. App. 319, 141 Pac. 229.

may use the leased property, the partner so holding the lease may properly renew it for his own benefit.[92] The same rule which governs the securing of leases applies to other benefits, and if a member of an insurance partnership secures a renewal of agencies in himself and for his own benefit, it is held that he takes them for the use of the firm, and this even though the other partners contemplated going out of business.[93]

§ 395. **Secret commissions.**—If a partner secure any secret commission from a person dealing with the firm, upon such transaction, it will be held for the benefit of the firm.[94] The partner receiving secret commissions on the partnership transactions must account for the whole amount of the commissions so received, even though he may have been assisted in the deal by a third person, to whom he paid a part of such commissions.[95] If, however, the third party knows of such improper actions by the partner, he becomes a party to the wrongful securing of the commission, and is liable with the partner to the remaining partners.[96] Such a wrongful commission is a fraud on the other partners, and is a ground for a dissolution of the partnership, at the option of the defrauded partners.[97] In the case, however, of two firms having a common member, and one of them selling for the other, upon a commission, the firms knowing of the common member, and there being no fraud or secret dealing in the transaction, the common member is entitled to retain for his own use his share of the commission.[98]

§ 396. **Duty not to conduct competing business.**—A perplexing question often arises in partnerships as to whether or

[92] Phillips v. Reader, 18 N. J. Eq. 95.

[93] Holmes v. Darling, 213 Mass. 303, 100 N. E. 611; Read v. Nevitt, 41 Wis. 348.

[94] Delmonico v. Roundebush, 5 Fed. 165, 2 McCrary (U. S.) 18; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Emery v. Parrott, 107 Mass. 95; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Grant v. Hardy, 33 Wis. 668.

[95] Grant v. Hardy, 33 Wis. 668.

[96] Emery v. Parrott, 107 Mass. 95.

[97] Short v. Stevenson, 63 Pa. St. 95.

[98] Freck v. Blakeston, 83 Pa. St. 474.

not a person who is a member of a partnership can, at the same time, be engaged in another business for his own benefit. Generally, the conducting by a partner, without consent of his copartners, of a separate business of like character as, and in competition with, that carried on by the firm is diametrically opposed to the idea of good faith, and a partner thus offending must turn his tainted profits into the partnership coffers.[99] As said in a United States case:[1] "The general principles * * * admit of no question, it being well settled that one partner can not, directly or indirectly, use partnership assets for his own benefit; that he can not, in conducting the business of a partnership, take any profit clandestinely for himself; that he can not carry on another in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he can not be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business." * * * It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, as was held

[99] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Crownfield v. Phillips (Md.), 92 Atl. 1033. See further Aas v. Benham (1891), 2 Ch. 244; McGahey v. Oregon King Min. Co., 165 Fed. 86; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Reber v. Pearson, 155 Mich. 593, 119 N. W. 897; Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Todd v. Rafferty's Admrs., 30 N. J. Eq. 254; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomps. & C. (N. Y.) 126 (affd. 59 N. Y. 659); In re Bast's Appeal, 70 Pa. St. 301; McMahon v. McClernan, 10 W. Va. 419; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424. Compare Pierce v. Daniels, 25 Vt. 624; and Bishop v. Riddle, 51 Tex. Civ. App. 317, 113 S. W. 151. It has been held that a partner may be enjoined from carrying on a competing business. Marshall v. Johnson, 33 Ga. 500.

[1] Jackson, J., in case of Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201 (1893).

in the thoroughly considered case of Aas v. Benham,[2] in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits. It was further laid down in that case, in explanation of what was said by Lord Justice Cotton[3] that: "It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd." And it was said by Lord Justice Bowen: "That the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right." The duty to account to the partners for whatever the firm is entitled to is well recognized in many American decisions.[4] Not only, it has been held, is the competing partner liable to an accounting to his copartners for any profits accru-

[2] (1891) 2 Ch. 244, 255.

[3] Dean v. MacDowell, 8 Ch. Div. 345.

[4] Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Coursin's Appeal, 79 Pa. St. 220; Simmons v. Vulcan Oil &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628.

ing to him from the competing business, but he is liable as well for any damages the partnership may sustain by reason of the competition.[5] But the right to demand of a partner that the partnership receive the profits resulting from his unlawful undertaking is a right personal to his copartner. It "is not available to third parties for the purpose of fixing a liability upon the partnership when such claim [of resulting benefit] has not been asserted."[6] And in this particular, even the violation of an express agreement may not give the copartners a right to share in the profits of the separate business,[7] their remedy being, it seems, by injunction or action for damages,[8] or by a bill in equity for an accounting.[9] A partner who makes secret profits by becoming interested in a company controlling the sale of the product of a mine operated by the partnership, must account to his copartners for the profits.[10] So a member of a partnership in the sale of mineral water and other goods which might be conveniently sold in connection, who, with his son, an employé of the firm, carries on a wine and whisky business, must account to the firm for profits so made.[11] This distinction should, however, be drawn, that it is rather the active co-operation in a competing business than the ownership therein that is objectionable, and at least one case holds that ownership in a similar business, without any active assistance thereto, is proper, and can be carried on by a partner for his own use.[12] The better and safer policy, however, and the one more consistent with the good faith required of partners, is to avoid any such relation, unless with the knowledge and consent of the copartner. Such assent

[5] Hellman v. Reis, 1 Cin. Super. Ct. Rep. (Ohio) 30, 13 Ohio Dec. 397.

[6] Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[7] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Aas v. Benham (1891), 2 Ch. 244; Dean v. McDowell, 8 Ch. Div. 345. See further King v. Whiton, 15 Wis. 684.

[8] Marshall v. Johnson, 33 Ga. 500.

[9] Moritz v. Peebles, 4 E. D. Smith (N. Y.) 135.

[10] Hurst v. Brennen, 239 Pa. 216, 86 Atl. 778.

[11] Holmes v. Darling, 213 Mass. 303, 100 N. E. 611.

[12] Pierce v. Daniels, 25 Vt. 624.

must, in court, whenever needed, be strictly proved, and will not be inferred from slight circumstances,[13] and a lapse of a considerable time by the partners in demanding an accounting after discovering the connection will not necessarily be construed an assent by them, provided such a delay, under the circumstances of the particular case, was not inconsistent with this right. In the absence of a custom or a definite agreement to the contrary, there is an unquestioned right to own or conduct a business entirely noncompeting and nonconflicting with the business of the partnership, provided, also, that the other business does not interfere in any manner with the proper application of the time, skill or financial aid which the partner owes the partnership, the amount of which, of course, varies in different partnerships.[14] A partner in a firm engaged in selling real estate on commission, who with his own money bought a tract, platted it, and placed it with the firm for sale, on the usual commission, when the firm had no funds with which to buy, and he had made an effort to get another to do it, was not liable to account to the firm for his profit on the transaction.[15] Though it has been held that an injunction will lie to restrain a partner, required to superintend and manage the business of his firm, from engaging, with the purpose of furthering his individual interests, in the same business in separate quarters at the same place, notwithstanding the fact that the partnership agreement does not expressly stipulate that he shall not thus do.[16] On the other hand it was held that one of the members of a commission

[13] Todd v. Rafferty, 30 N. J. Eq. 254.

[14] Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646; Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Shrader v. Downing, 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389n.

[15] Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646; McKenzie v. Dickinson, 43 Cal. 119; Belcher v. Whittemore, 134 Mass. 330; Shrader v. Downing, 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389n. See further Curry v. Chas. Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425; Sanderson's Admrs. v. Sanderson, 17 Fla. 820; Northrup v. Phillips, 99 Ill. 449; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Henson v. Byrne (Tex. Civ. App.), 41 S. W. 494.

[16] Marshall v. Johnson, 33 Ga. 500.

and warehouse firm whose partner refuses to provide buildings for the storage of cotton, as he is bound to do under the articles of association, may employ his personal funds in the erection of such buildings and appropriate to himself the profits arising from the storage of cotton therein, provided that this does not cause him to neglect the partnership affairs.[17] So, also, one who enters into a partnership "for the purpose of practicing the law" and agrees to give his "time and talents and strength to the prosecution of the interest of the firm," may, while giving all due attention to partnership matters and upon consent of his copartner, serve as executor of different estates, and the commissions which he under such circumstances thereby obtains will accrue to his individual benefit.[18]

§ 397. **Partnership in different firms.**—It seems deducible from the general principles of partnership that one person may be a partner in two or more firms, if they are not of a competing nature, if there is no requirement that he devote all his time to one of them, and if he makes no unfair use of his position in one or information there gained, by using them to advance the other. Of course, partnership in more than one firm may be provided for by agreement.[19] One partner is liable to copartners for loss caused by his forming an unauthorized partnership in another firm.[20] Where a partner in a wholesale business started a retail firm in the same line, and sold to it from the wholesale house at an insufficient price, the partner was charged on accounting after dissolution of the wholesale firm with the profits from the retail firm.[21] In several cases the right of copartners in one firm to share in profits made by one of their members as partner in another firm, has been denied.[22] In Texas, where a partnership

[17] Parnell v. Robinson, 58 Ga. 26.

[18] Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478.

[19] Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

[20] Reis v. Hellman, 25 Ohio St. 180. See Sweet v. Morrison, 103 N. Y. 235, 8 N. E. 396.

[21] Van Deusen v. Crispell, 114 App. Div. 361, 99 N. Y. S. 874.

[22] Murrell v. Murrell, 33 La. Ann. 1233; Freck v. Blakiston, 83 Pa. St. 474.

is considered a legal entity, a sale by the surviving partner in a dissolved partnership to a firm of which he was a member, made in good faith is not invalid as being a sale to himself.[23] The fact that one person is a partner in two different firms, one of which is indebted to the other, and becomes insolvent, does not prevent the solvent firm from recovering its debts or dividend from the other.

§ 398. Dealings between partner and firm.—A partner by being a member of a firm is not hindered from dealing with it in good faith so long as the firm receives a fair consideration for its bargain. So copartners may indorse a note to one of the firm,[24] or make it payable to him[25] with the same effect as if given to a stranger. And a deed to a partnership of which the grantee is a member is not void as being a deed to himself.[26] A firm may take and use a negotiable note or note and mortgage from a member. It was held a partner is liable to the firm on a note made by him to a third person and purchased by the firm, and though the debt is not actionable in law, it will be enforced in equity.[27] A partner may borrow money from the firm or loan money to it.[28] The rights of a partner in transactions such as those here considered were always enforcible at equity and under reformed

[23] Morris v. Owen (Tex. Civ. App.), 143 S. W. 227.

[24] Russell v. Swan, 16 Mass. 314.

[25] Baring v. Lyman, 1 Story (U. S.) 396, Fed. Cas. No. 983; Pitcher v. Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Thayer v. Buffum, 11 Metc. (Mass.) 398; Temple v. Seaver, 11 Cush. (Mass.) 314; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673; Blake v. Wheaton, 1 N. Car. 148.

[26] Henry v. Anderson, 77 Ind. 361. See Smyth v. Strader, 4 How. (U. S.) 404, 11 L. ed. 1031; Woodman v. Boothby, 66 Maine 389; Buchanan v. Mechanics Loan &c. Inst., 84 Md. 430, 35 Atl. 1099; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535.

[27] Baring v. Lyman, 1 Story (U. S.) 396, Fed. Cas. No. 983; Hall v. Kimball, 77 Ill. 161; Pike v. Hart, 30 La. Ann. 868; Galway v. Fullerton, 17 N. J. Eq. 389.

[28] McCall v. Moss, 112 Ill. 493; Leihy v. Briggs, 33 Ill. App. 534; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Armistead v. Spring, 1 Rob. (La.) 567; Brown v. Spohr, 87 App. Div. 522, 84 N. Y. S. 995; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 223; Lassiter v. Stainback, 119 N. Car. 103, 25 S. E. 726; Lovett v. Perry, 98 Va. 604, 37 S. E. 33.

codes of procedure may be enforced by an appropriate action.[29] A claim for work and labor may be assigned by the firm to a partner.[30] A partner to whom the firm is indebted for goods sold may pay himself from partnership assets.[31] A partner, also engaged in a separate business, is entitled to a fair market price for material sold by him to the firm.[32] Where a member of a firm of contractors was permitted by the agreement to take some of the work individually on subcontract, the firm was entitled to the same average profit on his work that it received on work done by other subcontractors.[33] And a partner who becomes jointly interested with another in the purchase of firm property is not relieved from paying his share of the purchase-price to the firm because he is a member.[34] Generally, where an assignee of a claim may sue in his own name the assignee of a claim by a partner against his firm, or of a firm against its partner may maintain an action thereon.[35]

§ 399. **Dealings between copartners.**—Copartners are not disqualified from making contracts with each other as individuals. Usually their rights under such contracts are the same as if they were not copartners.[36] This rule has been often ap-

[29] In re Buckhause, 2 Lowell (U. S.) 331, 4 Fed. Cas. No. 2086, 10 Nat. Bankr. Reg. 206; Hall v. Kimball, 77 Ill. 161; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Chapman v. Evans, 44 Miss. 113; Galway v. Fullerton, 17 N. J. Eq. 389; Cole v. Reynolds, 18 N. Y. 74; Lathrop v. Knapp, 37 Wis. 307; Piercy v. Fynney, L. R. 12 Eq. 69; De Tastet v. Shaw, 1 B. & Ald. 664; Midland R. Co. v. Taylor, 8 H. L. Cas. 751, 8 Jur. (N. S.) 419.

[30] Elliott v. Bidwell (S. Dak.), 152 N. W. 286.

[31] Cambre v. Lasseigne, 134 La. 94, 63 So. 680.

[32] Curry v. Charles Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425.

[33] Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833, 5 Ann. Cas. 659.

[34] Huffman Farm Co. v. Rush, 173 Pa. St. 264, 33 Atl. 1013.

[35] Pike v. Hart, 30 La. Ann. 868; Campbell v. Bane, 119 Mich. 40, 77 N. W. 322; Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158; Bank of British Columbia v. Delafield, 126 N. Y. 410, 27 N. E. 797.

[36] In re Waite, 1 Lowell (U. S.) 207, Fed. Cas. No. 17044; Paine v. Moore, 6 Ala. 129; Volk v. Roche, 70 Ill. 297; Berry v. DeBruyn, 77 Ill. App. 359; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Matthews, v. Perdue, 79 Mo. App. 149; Herbert v. Odlin, 40 N. H. 267; Mosteller v. Bost,

plied where the transactions between the partners had some relationship to firm property, or to partnership interests, where the result of the contract was to take everything connected with the transaction out of the partnership accounts.[37] Thus a loan of money to a copartner as an individual is valid, and its repayment enforcible by legal action, though it was used in the purchase of a share in the partnership.[38] And where a partner in a defunct bank assumed its liabilities as to depositors, other partners who were depositors were entitled to the benefit of such assumption.[39]

§ 400. Good faith required in partner's purchase of copartner's interest.—A purchase in good faith on fair consideration by one of two partners of his copartner's interest in the firm property vests in him the ownership of the firm property,[40] and a provision in a partnership agreement which reserves to one partner the right to purchase the assets and business of the firm in case of disagreement is valid, and does not destroy the equality of the partners.[41] One partner may sell his interest to

42 N. Car. 39; McCoy v. McCoy, 202 Pa. 497, 52 Atl. 180; Jarecki v. Hays, 161 Pa. St. 613, 29 Atl. 118; Holt v. Howard, 77 Vt. 49, 58 Atl. 797; Bright v. Carter, 117 Wis. 631, 94 N. W. 645; Want v. Reece, 1 Bing. 18; Bedford v. Brutton, 1 Bing. N. Cas. 399, 1 Scott 245.

[37] McDougald v. Banks, 13 Ga. 451; Jones v. Fields, 57 Iowa 317, 10 N. W. 747; Morrison v. Stockwell, 9 Dana (Ky.) 172; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Hoskins v. Dickinson, 124 Mich. 11, 82 N. W. 660; Bullard v. Hascall, 25 Mich. 132; Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394; Love v. Van Every, 18 Mo. App. 196; Coggschall v. Muger, 54 Mo. App. 420; Howard v. France, 43 N. Y. 593, 3 Alb. Law. J. 305; Davies v. Skinner, 58 Wis. 638, 17 N. W. 427, 46 Am. Rep. 665.

[38] Hill v. Beach, 12 N. J. Eq. 31; Thomson v. Mylne, 11 Rob. (La.) 349; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Ford v. McBryde, 45 Tex. 498. A partner who canceled on firm books an indebtedness due on account of certain farms owned equally by the partners, without the knowledge of his copartner, was held not to have become indebted to the latter. Cole v. Hayutin, 109 Ark. 617, 160 S. W. 1084.

[39] Grove v. Keeling (Tex. Civ. App.), 176 S. W. 822.

[40] McFadden v. Shanley (Ariz.), 141 Pac. 732; Rankin v. Kelly, 163 Ky. 463, 173 S. W. 1151; Baker v. Cummings, 4 App. Cas. (D. C.) 230.

[41] Phillips v. Crownfield, 124 Md. App. 443, 92 Atl. 1030.

his copartner and recover the purchase-price by action at law.[42] But where one partner seeks to purchase the interest of another he must, in utmost good faith, frankly and honestly inform the other of all he knows which affects the value of such interest.[43] "It is clear law that in a transaction between copartners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that, unless such information has been furnished, the sale is voidable and may be set aside."[44] And the rule has been applied where a partner in good faith misrepresented his financial condition.[45] If the purchasing partner conceals any facts affecting the value of the interest purchased, equity will grant relief, and the sale may be set aside or the purchasing partner held to account for his profits in the

[42] Bigham v. Tinsley, 160 Mo. App. 605, 140 S. W. 1193.

[43] Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Reese v. Bradford, 13 Ala. 837; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Baker v. Cummings, 4 App. Cas. (D. C.) 230; Hopkins v. Watt, 13 Ill. 298; Smith v. Roberts, 182 Ill. App. 227; Rankin v. Kelly, 163 Ky. 463, 173 S. W. 1151; Muir v. Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. L. 14; Chase v. Garvin, 19 Maine 211; Pomeroy v. Benton, 57 Mo. 531; Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770; Gilbert v. Anderson, 73 N. J. Eq. 243, 66 Atl. 926; Styles v. Shaver, 151 App. Div. 903, 136 N. Y. S. 347; Kelly v. Delaney, 136 App. Div. 604, 121 N. Y. S. 241; Wright v. Duke, 91 Hun (N. Y.) 409, 36 N. Y. S. 853, 72 N. Y. St. 375; Seal v. Holcomb, 48 Tex. Civ. App. 330, 107 S. W. 916; Smith's Admr. v. Smith, 30 Vt. 139; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Finn v. Young, 46 Wash. 74, 89 Pac. 400; Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4; Law v. Law (1905), 1 Ch. 140. See cases cited in note 4, § 381, on good faith a duty. See also Evans v. Bradford, 35 Ind. 527; Maxfield v. Seabury, 75 Minn. 93, 77 N. W. 555; Wiley v. Brundred, 158 Pa. St. 579, 28 Atl. 173, 180; In re Blackiston's Appeal, 81 Pa. St. 339; Weirich v. Dodge, 101 Wis. 621, 77 N. W. 906. Contra: Patrick v. Bowman, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811.

[44] Law v. Law (1905), 1 Ch. 140.

[45] Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712.

deal,[46] and the remedy of such partner is not affected by the fact that his copartners purchased his interest not from him directly but from a third party to whom they induced him to sell, though not acting for them.[47] The sale was set aside where the purchasing partners knew of large contracts secured by the firm in England and, concealing such knowledge, bought the interest of the copartners.[48] Where one partner threatens to sell to an outsider, in violation of the partnership agreement, it is not coercion of the other partner in order to make him buy the share.[49] It was held in California, however, that when one partner authorized the sale of his interest, the relation between him and his copartner was at an end, and the latter was not bound to make full disclosures when dealing with him.[50] This scarcely seems a just holding, nor in harmony with the general rule requiring good faith between partners.

The promise of a non-active partner to consent to a sale of the firm property, upon a promise of the active partner to repay his cash contribution, is based on a sufficient consideration.[51] Where one partner has given a note for his copartner's interest, the consideration has not failed because the copartner did not turn over as assets the evidence of certain contracts.[52]

§ 401. Duty to share outlays and losses.—It has been seen, from the general principles of partnership herein discussed, that, in the absence of an agreement to the contrary, each partner must bear his proportionate share of losses incurred in the proper management of the business. Losses must, of course, be paid first out of the profits. If the profits are not sufficient to pay losses, then the burden must next fall on the capital of

[46] Smith v. Roberts, 182 Ill. App. 227; Rankin v. Kelly, 163 Ky. 463, 173 S. W. 1151; Nelson v. Matsch, 38 Utah 122, 110 Pac. 865, Ann. Cas. 1912 D, 1242n.

[47] Yost v. Critcher, 112 Va. 870, 72 S. E. 594.

[48] Goldsmith v. Koopman, 152 Fed. 173, 81 C. C. A. 465.

[49] Taylor v. Ford, 131 Cal. 440, 63 Pac. 770.

[50] Wise Realty Co. v. Stewart (Cal.), 146 Pac. 534.

[51] Eastburn v. Eddleblute, 53 Pa. Super. Ct. 234.

[52] Smith v. Roberts, 182 Ill. App. 227.

the firm, so it is only in case of failure of the assets of the firm to meet losses that the partners can be held individually, as between themselves, to bear such losses, but the obligation undoubtedly exists in such a contingency.[53] The Uniform Partnership Act provides that, "each partner must contribute to the losses whether of capital or otherwise sustained by the partnership according to his share in the profits."[54] In case the loss simply falls upon the capital, and there is a dissolution, with impaired capital, there is some diversity of opinion as to the dividing of the loss where one partner has furnished the capital and the other the skill and experience. Several cases[55] hold that the partner furnishing his services as his capital can not be held for any further loss. In one Pennsylvania case it was held to be a case for a jury to decide.[56] Perhaps the distinction between the two rules lies in the question as to whether the partnership was in the capital itself or simply in the profits of the business, in which latter case the loss would fall upon the owner of the capital, in the absence of an agreement thereto.[57] The above is held to be particularly true in a Kentucky case,[58] in a single adventure, where one partner contributed the capital and the other the services. The rule of the duty of contribution to losses by all partners does not apply if the loss was caused by the bad faith or wrongdoing of one partner, but the loss must fall on him alone.[59] In any case, as between the partners them-

[53] Leach v. Leach, 18 Pick. (Mass.) 68; Luce v. Hartshorn, 7 Lans. (N. Y.) 331; Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067. See § 358, on repayment of capital; §§ 71, 111, 112, on sharing profits and losses; § 295, on proportionate shares of partners.

[54] Uniform Partnership Act, § 18(a).

[55] Hasbrouck v. Childs, 3 Bosw. (N. Y.) 105; Everly v. Durborrow, 8 Phila. (Pa.) 93; Cameron v. Watson, 10 Rich. Eq. (S. Car.) 64.

[56] Yoke v. Barnet, 3 Watts & S. (Pa.) 81.

[57] Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Appeal of Plumly, 1 Monag. (Pa.) 177, 16 Atl. 728.

[58] Heran v. Hull, 1 B. Mon. (Ky.) 139, 35 Am. Dec. 178.

[59] See §§ 382, 383, 384, on negligence, bad judgment, fraud; § 356 in preceding chapter, on partner failing or refusing to perform services. See also Maher v. Bull, 44 Ill. 97; Morrison v. Kramer, 58 Ind. 38; Walpole v. Renfroe, 16 La. Ann. 92; Gor-

selves, the loss or outlay must have been within the scope of the business, if contracted by one partner or even by any number less than all, unless assented to or ratified by the others, in order to hold the nonparticipating partner. An agreement that one partner should not share losses was supported by sufficient consideration when it was obtained by his consent that the firm, which had been doing a cash business, should make sales on time.[60]

§ 402. Duty to consult partner on firm matters.—Each partner has an interest in the business, and is therefore concerned about the policies of the firm, and must, in the absence of partnership agreement to the contrary, be consulted about the management of the firm business. The duty to consult the copartner is the corollary of each partner's right to participate in the management of the business. "In every important exigency the partner about to act should consult the other partner, at least if there are no circumstances which excuse him from so doing."[61] In the case from which the above words are quoted it was held gross negligence to fail to consult a partner, when, by so doing, he would have found that an outstanding title to property which the firm owned, and which title he bought, was worthless, as the firm already held good title to the lands.

§ 403. Duty to estate of copartner.—Should one partner die the responsibility devolves upon the survivor of exercising an equal or even greater diligence and honesty in relation to the property, owing to the close relations and good faith supposed to exist between them while associated together. Practically all the duties owing by one partner to another during the life of both continue after the death of the other partner, excepting those which are personal in nature, and there are many added duties

don v. Moore, 8 Pa. Co. Ct. Rep. 289.

[60] Holdridge v. McKewen, 107 Ark. 368, 155 S. W. 113.

[61] Yorks v. Tozer, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. 395.

devolving upon the surviving partner. This question will be discussed at length in a subsequent chapter.[62]

§ 404. Liability for torts.—The question of liability for torts is applied chiefly in the relations of the firm with third parties, rather than to the relations of the partners inter sese, yet is often raised in internal affairs. Inasmuch as this phase of the subject is closely associated with the questions of accounting and dissolution, it will be treated under these headings.

§ 405. Criminal liability of partner for embezzlement or larceny of firm property or forgery of firm name.—A partner can not be guilty of embezzlement of partnership property any more than his own property, since the ownership and right to possession is in him, and he is a principal as well as agent in the partnership.[63] So if one uses money for other purposes, given him by another to invest in the purchase of a business, or otherwise, they to be partners, it is not embezzlement.[64] But if any condition precedent to a contract of partnership remains to be performed before funds became partnership property, then the party who misappropriates the funds may be guilty of embezzlement.[65] And as a voluntary unincorporated association for mutual aid, and not for making profits, is not a partnership, one of its members who converts its funds wrongfully to his own use can not escape liability on the ground that his act was the conversion of partnership funds.[66] This rule does not apply

[62] See ch. 20.

[63] Gary v. Northwestern Mutual Aid Assn., 87 Iowa 25, 53 N. W. 1086; State v. Butman, 61 N. H. 511, 60 Am. Rep. 332; Commonwealth v. Arnheim, 3 Pa. Super. Ct. 104; O'Marron v. State (Tex. Civ. App.), 147 S. W. 252; Ray v. State, 48 Tex. Cr. 122, 86 S. W. 761; Reg v. Robsen, 16 Q. B. D. 137, 15 Cox C. C. 772.

[64] Manuel v. State, 44 Tex. Cr. 433, 71 S. W. 973; Dancy v. State, 41 Tex. Cr. 293, 53 S. W. 886. But compare Butler v. State, 54 Tex. Cr. 42, 111 S. W. 146.

[65] Ray v. State, 48 Tex. Cr. 122, 86 S. W. 761; McCrary v. State, 51 Tex. Cr. 496, 103 S. W. 924, 123 Am. St. 905, 14 Ann. Cas. 722; Napoleon v. State, 3 Tex. App. 522.

[66] Leacock v. State, 136 Ind. 217, 36 N. E. 137; State v. Campbell, 59 Kans. 246, 52 Pac. 454; Reg. v. Waite, 2 Cox C. C. 245; Reg. v. Robsen, L. R. 16 Q. B. D. 137; Reg. v.

when a clerk employed by trustees collects dues by virtue of his office and converts them,[67] and some statutes may make an officer who is also a shareholder of a voluntary association liable for embezzlement if he converts its funds received in course of his duty to his own use.[68] A surviving partner, under a statute making his duties similar to those of administrators and executors, acts in a fiduciary capacity, and may be guilty of embezzlement under a statute defining embezzlement where one acts in a fiduciary capacity.[69] After settlement, if one partner employs another partner to make collections of drafts or notes the latter has been held guilty of embezzlement if he converts the proceeds to his own use.[70] A false representation by a partner as to the financial standing of a firm of which he is a member is a representation as to his own standing and may render him liable for false pretense if he obtains credit by means of such false representation.[71] False representations made in the sale of an interest in a partnership as to the property and value of an interest in the business, and as to the skill of one partner may support a conviction of false pretenses.[72] It has been held that a partner signing the firm name as acceptor of a bill of exchange without authority with intent to defraud is guilty of a forgery, as this makes his partner personally liable on the bill in the hands of innocent third parties.[73] But the contrary has been held where a partner used the firm name in an attempt to defraud the partnership, the reasoning of the court being that as he was a joint owner of partnership property he could not be

Taffs, 4 Cox C. C. 169; Rex v. Bren, Leigh & C. 97.

[67] Reg. v. Murphy, 4 Cox C. C. 101; Reg. v. Proud, L. & C. 97; Reg. v. Woolley, 4 Cox C. C. 255.

[68] State v. Wise, 186 Mo. 42, 84 S. W. 954; State v. Knowles, 185 Mo. 141, 83 S. W. 1083; State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. 564.

[69] State v. Matthews, 129 Ind. 281, 28 N. E. 703.

[70] Sharpe v. Johnston, 59 Mo. 557.

[71] Berkenfeld v. People, 92 Ill. App. 400 (affd. 191 Ill. 272, 61 N. E. 96); People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469, 20 N. Y. Cr. 246; People v. Rothstein, 42 Misc. (N. Y.) 123, 83 N. Y. S. 1076, 18 N. Y. Cr. 65.

[72] Commonwealth v. Blood, 141 Mass. 571, 6 N. E. 769.

[73] Rex v. Holden (1912), 1 K. B. 483, Ann. Cas. 1912 B, 700.

guilty of such a crime as to such property.[74] It was held that where one fraudulently signed the name of a firm himself a partner which either had never existed or had been dissolved, he was guilty of forgery.[75] There can be no larceny of partnership property by a partner, since he is a joint owner of it.[76] Where partners had entered into a contract for dissolution whereby one was to purchase the other's entire interest and before payment in full to the selling partner a debtor of the firm voluntarily paid him the sum due, it was not larceny when the selling partner failed to pay over or account for the money so received, though he was afterward paid in full by the buying partner, and signed an instrument which dissolved the partnership.[77]

[74] Commonwealth v. Brown, 10 Phila. (Pa.) 184, 30 Leg. Int. 200.

[75] Commonwealth v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703.

[76] State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. 564. See also Northcutt v. State, 60 Tex. Cr. 259, 131 S. W. 1128, 31 L. R. A. (N. S.) 822.

[77] Phelps v. State, 109 Ga. 115, 34 S. E. 210.

CHAPTER XV

POWER OF PARTNER TO BIND FIRM IN CONTRACT

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§ 410. **In general.**—This chapter is concerned with the power and authority of a partner to bind the firm by his acts and contracts. Naturally, this involves the powers of doing business which the firm has and its liabilities to third parties, and something of the rights and duties of partners between themselves, all of which correlative subjects have been or will be treated in other chapters.

§ 411. **Authority of partner, based on agency.**—One of the essentials or results of the partnership relation is that each partner is the agent for the other partners and the partnership in the partnership business.[1] Each partner is thus a principal as well

[1] Saunders v. Bentley, 8 Iowa 516; Barker v. Mann, 5 Bush (Ky.) 672, 96 Am. Dec. 373; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Chapin v. Cherry, 243 Mo. 375, 147 S. W. 1084; Roney v. Buckland, 4 Nev. 45; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Babcock v. Stewart, 58 Pa. St. 179; Loudon Savings Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Congdon v. Morgan, 13 S. Car. 190; Wheatcroft v. Hickman, 9 C. B. (N. S.) 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 7 Jur. (N. S.) 105.

as an agent.[2] The agency thus created is general.[3] The authority of the partner to bind the firm and his copartners is based solely on agency.[4] This agency is, however, only for the transaction of the business in the usual way.[5]

Judge Story says: "Having completed our review of the law of agency, we are naturally conducted, in the next place to the consideration of the law of partnership; for every partner is an agent of the partnership, and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal, and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership, whereas an agent as such has no interest in either."[6]

Chief Justice Marshall said: "Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public, which subserve the purpose of justice and which society is concerned in sustaining. One of these is * * * that a partner (certainly the acting partner) has the power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a par-

[2] Municipal Paving Co. v. Herring (Okla.), 150 Pac. 1067.

[3] Tate v. Holly, 21 Colo. App. 451, 122 Pac. 58.

[4] Persons v. Oldfield, 101 Miss. 110, 57 So. 417.

[5] Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed 216; Catlin v. Gilder, 3 Ala. 536; Hotchin v. Kent, 8 Mich. 526; Kirby v. Ingersoll, Har. (Mich.) 172; Hoskinson v. Eliot, 62 Pa. St. 393.

[6] Story Partnership, § 1.

ticular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company whoever may compose it. * * * The acting partners are identified with the company and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles."[7]

The Uniform Partnership Act is in this respect practically declaratory of the common law, as follows: "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution of the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by other partners."[8]

§ 412. Kind of partnership as affecting powers of partner. —The extent of the powers of a partner as general agent of the firm depends very much on whether he is a member of a trading or commercial partnership or of a nontrading partnership. It is said that the power of one partner to bind the firm by a contract entered into on its behalf will be implied by law only in case of commercial partnerships and that in other partnerships it is a question of fact depending on the partnership agreement, customs of the business and other circumstances.[9] "Wherever

[7] Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

[8] Uniform Partnership Act, § 9 (1) (2).

[9] Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185.

the business, according to the usual mode of conducting it, imports in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation."[10] "It is with respect to those partnerships the nature of whose business naturally comprehends certain courses of dealing that the law says that they belong to the class denominated commercial or trading. These are those whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit and the usual instrumentalities of trade and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally."[11] In case of a nontrading partnership, the burden of showing agency is said to be on the one who seeks to hold the partnership, and he should show either express authority, that the contract concerned something necessary to the business, or that usually in such partnerships a partner has such authority.[12] But generally within the scope of the business which is necessary limited the member of a nontrading partnership may bind the firm.[13] The main distinction is that the member of a trading firm has the implied power to borrow money on the firm credit and to give firm negotiable paper, while the member of a nontrading firm has no such implied power, and authority or ratification must be shown.[14] But the power may be shown from the organization and purposes of the particular firm.[15]

[10] Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

[11] Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40.

[12] Woodruff v. Scaife, 83 Ala. 152, 3 So. 311. Examples of trading and nontrading partnerships are given in a subsequent section, when considering the power to give commercial paper.

[13] Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. 73; Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; Lee v. First Nat. Bank, 45 Kans. 8, 25 Pac. 196, 11 L. R. A. 238.

[14] Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89; Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315; Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[15] Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95. Compare Leffler v. Rice, 44 Ind. 103; and Hoskinson v. Eliot, 62 Pa. St. 393. See cases cited in § 486. Contract binding on firm.

§ 413. Scope of business.—The scope of a partner's authority is therefore measured by the character of business conducted, and is limited only by the scope of the partnership business, and within the scope of such authority, he may bind his copartners as any other general agent may bind his principals.[16] So it has been held that one partner may bind the firm by a contract for alterations in the building where it is to carry on its business,[17] and two of three partners engaged in forming a corporation to take over land could inform purchasers of interests in the corporation that the partnership would look after the details and bear the cost of forming the corporation, and thus bind the third partner.[18] So where land was listed with one member of a partnership, upon an agreement that he should receive a commission on its sale, and afterward, without his knowledge, or a waiver of his right to a commission, other members of the firm bought the land individually and agreed in the contract of sale that the vendor should not pay a commission, this bound the third partner, the others being held to have acted within their authority as agents in a partnership transaction.[19] Many illustrations of the authority of partners to bind the firm to contracts of various specific kinds will follow in succeeding sections.

However, a partner has no implied authority to make an unlawful contract,[20] nor can he because of the partnership relation modify a contract which another partner had made individually.[21] Generally a contract made by one partner outside the scope of the partnership business does not bind the firm unless ratified, or unless he was expressly authorized by the

[16] See cases cited in § 486. Contracts binding on firm. Little v. Britton (Ala.), 66 So. 694; Shackelford v. Williams, 182 Ala. 87, 62 So. 54; Fetner v. American Nat. Bank (Ga. App.), 84 S. E. 185; Van Dyk v. Mosterdt (Iowa), 153 N. W. 206; Craig v. Warner, 216 Mass. 386, 103 N. E. 1032; Reirden v. Stephenson, 87 Vt. 430, 89 Atl. 465.

[17] William L. Blanchard Co. v. Hilton, 83 N. J. L. 780, 85 Atl. 456.

[18] Tanner v. Sinaloa Land &c. Co., 43 Utah 14, 134 Pac. 586.

[19] Burns v. Russell Bros. (Tex. Civ. App.), 146 S. W. 707.

[20] Minthorn v. Haines, 169 Mich. 169, 134 N. W. 1113.

[21] Youtsey v. Lemley (Iowa), 151 N. W. 491.

other partners to make it.[22] Thus it is held one partner can not bind another by a sale of land unless the partnership was dealing in lands of which those in question were a part,[23] nor is there implied authority in one partner in the ownership of furnishings of certain apartments to sell the whole without the consent of the other,[24] nor is the partnership bound by one partner's act in subscribing for corporate stock where such act was not within the scope of the business and was not authorized.[25] A third person's right to rely upon a partner's authority within the scope of the business can not be defeated by secret restrictions or limitations upon his authority or secret agreements among the partners.[26] Thus a partnership formed to operate a tobacco warehouse has been held liable for tobacco bought by one of the partners upon private speculation in the profits of which the firm is not to share, where the partners permitted him to enter into the speculation because it would increase the business of the warehouse to the benefit of the firm, and the transaction was within the apparent scope of the partner's authority.[27] "If an act can be said to have been necessary for the carrying on of the business of the partnership in the ordinary way, the firm will, prima facie, be liable, although the act was not authorized by all the partners; but if the act was not necessary for the carrying on of the business of the partnership in the usual way, the firm will not be liable."[28]

§ 414. Partnership customs and usages as affecting partner's authority.—Articles of partnership may be enlarged

[22] Lichenstein v. Murphree, 9 Ala. App. 108, 62 So. 444; Brown v. First Nat. Bank, 35 Okla. 726, 130 Pac. 140; Munday Trading Co. v. J. M. Radford Grocery Co. (Tex. Civ. App.), 178 S. W. 49.

[23] Nichols v. Burcham, 177 Mich. 601, 143 N. W. 647.

[24] Phœnix Ins. Co. v. Fleenor, 104 Ark. 119, 148 S. W. 650.

[25] Wright Bros. v. Merchants' &c. Packet Co., 104 Miss. 507, 61 So. 550, Ann. Cas. 1915 C, 1111.

[26] Shackelford v. Williams, 182 Ala. 87, 62 So. 54; Lichenstein v. Murphree, 9 Ala. App. 108, 62 So. 444.

[27] Green v. Ervin, 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015. See, however, Maurin v. Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. 568.

[28] Graves v. Kellenberger, 51 Ind.

by a general usage or habit of conducting the affairs of the firm acquiesced in by all the members.[29] The authority of one partner to act for and charge the firm may be shown by a course of business between the members of the firm.[30] But the "course of business" to bind an individual partner, who did not expressly authorize it, must be such as to indicate that he not only knew the course of dealing but assented to it as a regular course of dealing.[31] Infrequent acts are not sufficient to show a course of dealing. And the fact that a partnership may frequently have drawn checks against its funds in bank to discharge the individual debt of a member does not constitute a course of dealing that will justify the bank in assuming that it is in the scope of the partnership business to pledge its credit and give its note in satisfaction of a debt due by one of the partners to the bank.[32] Generally speaking, the act of one member of the firm inconsistent with the practice and usage of the business of the partnership is outside the scope of the partnership as a matter of fact and a party thus acting with the firm will not be heard to plead ignorance.[33] Those dealing with a partnership are bound to take notice of general business usages which may affect a partner's authority to bind the firm.[34]

§ 415. What contracts require consent of all partners.—It is specified in the Uniform Partnership Act that: "Unless authorized by the other partners or unless they have abandoned

66. See Webster v. Rackett, 7 Hun (N. Y.) 229.

[29] Eady v. Newton Coal &c. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650.

[30] Pursley v. Ramsey, 31 Ga. 403; Woodward v. Winship, 12 Pick. (Mass.) 430; Davis v. Dodge, 30 Mich. 267; Midland National Bank v. Schoen, 123 Mo. 650, 27 S. W. 547; Burchell v. Voght, 35 App. Div. 190, 55 N. Y. S. 80 (affd. 164 N. Y. 602, 58 N. E. 1085); Galloway v. Hughes, 1 Bailey (S. Car.) 553.

[31] Eady v. Newton Coal &c. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650.

[32] People's Saving Bank v. Smith, 114 Ga. 185, 39 S. E. 920.

[33] Biggs v. Hubert, 14 S. Car. 620.

[34] Standard Wagon Co. v. Few, 119 Ga. 293, 46 S. E. 109; Herlehy v. Ferguson, 47 App. Div. 237, 62 N. Y. S. 648; Venable v. Levick, 2 Head (Tenn.) 351; Peterson v. Armstrong, 24 Utah 96, 66 Pac. 767; Cavanaugh v. Salisbury, 22 Utah 465, 63 Pac. 39; Town v. Hendee, 27 Vt. 258.

the business, one or more but less than all the partners have no authority to: (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership, (b) Dispose of the good will of the business, (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership, (d) Confess a judgment, (e) Submit a partnership claim or liability to arbitration or reference."[35] In what respects, if any, these powers can be exerted by a single partner under the law as now interpreted in the various jurisdictions will be ascertained in later sections. As a general rule it may be said that one member of a partnership has no implied authority to dispose of the property of the partnership in satisfaction of his individual debt or for his individual benefit.[36] Nor can he as a general rule bind the partnership on a contract of guaranty or suretyship, the reason being that such contract is usually without the scope of the partnership business, and the partner who makes such a contract acts

[35] Uniform Partnership Act, § 9 (3).

[36] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Eady v. Newton Coal &c. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Carter v. Galloway, 36 La. Ann. 473; Johnson v. Crichton, 56 Md. 108; Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. 742; Buck v. Mosley, 24 Miss. 170; Clift v. Moses, 112 N. Y. 426, 20 N. E. 392; Hartness v. Wallace, 106 N. Car. 427, 11 S. E. 259; Pepper v. Peck, 17 R. I. 55, 20 Atl. 16; Rogers v. Betterton, 93 Tenn. 630, 27 S. W. 1017; Woolson v. Fuller, 71 Vt. 335, 45 Atl. 753; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539. "Each member of a firm is the general agent of the firm in relation to all the business of the firm, and can bind the firm in what he says and does in such business. But, when one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the transaction." Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293. Negotiable paper made in the name of one partner, when his name is not also that of the firm, is not ordinarily binding upon the firm, and is prima facie the individual obligation of the maker; yet such paper, taken when the obligation was incurred by the partnership and upon its credit, will be regarded as merely collateral, and the other partner will be held liable on the original consideration. Mills v. Riggle, 83 Kans. 703, 112 Pac. 617, Ann. Cas. 1912 A, 616.

outside the scope of his implied authority as agent of the firm.[87] So the general rule is that to change the nature of the firm business, its place of business or its membership, requires the consent of all partners.[88] According to the general rule, apart from the Uniform Partnership Act, one partner can not convey partnership real estate in the firm name.[89] Nor, as will be seen in later sections of this chapter, can he confess judgment, submit a cause to arbitration or make an assignment for benefit of creditors. And in a nontrading partnership one partner has a very limited power to bind the firm, and most acts which a partner in a commercial firm has implied power to perform require the assent of all members of a nontrading firm, as will be seen in the discussion of particular powers following.

§ 416. Powers of a majority in partnership matters.—The question often arises in partnerships as to whether a majority of the members of a partnership may override the minority membership, and if so, to what extent. By the great weight of authority, there are certain conditions under which the majority may rule, while there are other conditions under which even one member out of any number of partners can veto the plans of the other partners. As in other matters, the contract of partnership should first be observed, and if it is there provided

[87] Hollister v. Bluthenthal, 9 Ga. App. 176, 70 S. E. 970. In the above case it is said: "A contract of this character although executed in the name of the firm, is prima facie the individual contract of the partner who made it, and the burden of proof is upon the holder of the contract to show that it is in fact a firm transaction. This can be done by evidence that the contract was in fact within the scope of the partnership business, or that it was authorized by the other members of the firm, or that it was entered into in the name of the firm by the individual member with the knowledge of all the other members, or was subsequently ratified by them." See also Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n.

[88] Chicago &c. R. Co. v. Hoyt, 1 Ill. App. 374 (affd. 93 Ill. 601); Abbot v. Johnson, 32 N. H. 9; In re Jenning's Appeal, 2 Monag. (Pa.) 184, 16 Atl. 19, 2 L. R. A. 43; Clements v. Norris, 47 L. J. Ch. 546, 8 Ch. D. 129, 38 L. T. 591; Natusch v. Irving, 2 Coop. C. C. 358; Chapple v. Cadell, Jac. 537, 23 R. R. 138.

[89] See ante §§ 269, 301 et seq

that the majority shall govern, it will, as a general rule, control the situation, provided, of course, the action is taken by the majority in good faith. If, however, the articles do not provide for government by a majority, the question becomes more complicated, although resting upon some well established principles. A partnership, almost invariably has certain objects and rules of action and it is, in most jurisdictions, within the power of a majority of the partners to rule as to such matters, that is, in the matters of ordinary transactions. Mr. Collyer, in his work on Partnership, says that: "It may perhaps be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary trans actions of the partnership." In Story on Partnership,[40] the author disposes of the question as follows: "Where there is no stipulation in the partnership articles to control or vary the result (for if there be any stipulation that ought to govern), the general rule would seem to be that each partner has an equal voice, however unequal the shares of the respective parties may be, and the majority, acting fairly and bona fide, have the right and authority to conduct the partnership business within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the minority." It was said in a prominent Pennsylvania case:[41] "If, then, the rule be that in the management of the interior affairs of a partnership, a majority of the partners must govern, what is there in this case to take it out of the rule?" It is thus clearly seen that the power of a majority to rule depends upon whether the act done by the majority is one in or connected with the usual business of the partnership, and in accord thereto, or is one outside of and not contemplated in the regular course of the partnership business. As examples of the above it has been held that the majority can rule where they want to borrow money,[42] also where the majority approved and adopted ac-

[40] Ch. 7, § 123.

[41] Peacock v. Cummings, 46 Pa. St. 434 (1863).

[42] Gregory v. Patchett, 33 Beav. 595; Byron v. Metropolitan Saloon Omnibus Co., 3 DeG. & J. 123, 27 L.

counts fairly laid before them,[43] or in collecting debts.[44] The authorities are uniform and emphatic that in case of diversity of opinion the majority of the members of a partnership, acting in good faith as to ordinary incidents of the business, within the powers which may be carried out by less than all the partners acting unanimously, and where there is no provision in the partnership contract to prevent, may manage the business as they see fit,[45] and are fully as well settled that the majority must act within the bounds established originally by the consent of all.[46] This has been held even where the articles of partnership provide that the majority shall govern.[47] However, it would seem that the articles might be so comprehensive as to give the majority the power to govern even as to extrinsic matters or as to matters not originally intended, but the authority must clearly show that this broad power was intended, and that a simple authorization for government by a majority would not give this power, but the articles must affirmatively show that extrinsic or new matters were included. Among the matters which the courts have decided are not within the control of a majority (without direct authorization) may be mentioned:

J. Ch. 685, 4 Jur. (N. S.) 1262, 6 W. R. 817.

[43] Kent v. Jackson, 2 DeG., M. & G. 49.

[44] Greek-American Produce Co. v. Pappas, 9 Ala. App. 311, 63 So. 799.

[45] Johnston v. Dutton, 27 Ala. 245; Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co., 92 Ark. 271, 122 S. W. 658; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Copp v. Longstreet, 5 Colo. App. 282, 38 Pac. 601; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Western Stage Co. v. Walker, 2 Iowa 504, 65 Am. Dec. 789; Staples v. Sprague, 75 Maine 458; Nolan v. Lovelock, 1 Mont. 224; Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 400; Markle v. Wilbur, 200 Pa. St. 457, 50 Atl. 204; Clarke v. State Valley R. Co., 136 Pa. St. 408, 20 Atl. 562, 10 L. R. A. 238; Peacock v. Cummings, 46 Pa. St. 434; Reirden v. Stephenson, 87 Vt. 430, 89 Atl. 465; Wall v. London & Northern Assets Corp. (1898), 2 Ch. 469; Const v. Harris, Turn. & R. 496, 24 R. R. 108.

[46] Abbot v. Johnson, 32 N. H. 9; Kean v. Johnson, 9 N. J. Eq. 401; Jenning's Appeal, 2 Monag. (Pa.) 184, 16 Atl. 19, 2 L. R. A. 43 (1888); Natusch v. Irving, 2 Coop. C. C. 358.

[47] Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573.

change of capital;[48] change in the articles of copartnership;[49] change of the character or scope of the business of the partnership;[50] change in the persons constituting the partnership;[51] and change in application of profits.[52] An important point upon the question here discussed is decided in a Georgia case,[53] which holds that a creditor of one partner, who is a debtor to the firm as well, can not settle his debt to the firm by crediting it upon his claim against one partner, unless this is done with the consent of all the partners. One partner can not have his contingent liability to the firm released by a majority of the firm.[54] If a majority of the partners arrive at a final settlement it can not bind the minority without the consent of the minority.[55] The Uniform Partnership Act fairly expresses the general rule as follows: "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."[56]

§ 417. Powers of managing partner.—As between himself and the other partners, a managing partner is limited by the express authority given him, and the general authority which the law implies in a partner to bind the firm in the particular business which it is carrying on. With regard to third parties the authority of a managing partner is the same as that of any other partner, except in so far as he has been held out as having greater authority. It is not necessary in order to bind

[48] Gansevoort v. Kennedy, 30 Barb. (N. Y.) 279. Smith v. Goldsworthy, 4 Q. B. 430, 3 G. & D. 448, 12 L. J. Q. B. 192.

[49] Ex parte Morgan, 1 Mac. & G. 225.

[50] Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

[51] Tabb v. Gist, 6 Call (Va.) 279, 1 Brock. 33, Fed. Cas. No. 13719.

[52] Macdougall v. Jersey &c. Hotel Co., 2 Hem. & M. 528.

[53] Harper v. Wrigley, 48 Ga. 495.

[54] Bill v. Porter, 9 Conn. 23.

[55] Lamalere v. Caze, 1 Wash. (U. S.) 435, Fed. Cas. No. 8003; Chadsey v. Harrison, 11 Ill. 151; Cooper v. Frederick, 4 G. Greene (Iowa) 403.

[56] Uniform Partnership Act, § 18(h).

other partners that they should have known or consented to acts within the scope of the authority given him.[57] As managing partner he may bind the firm by borrowing money[58] or executing firm notes,[59] or renewing notes,[60] at least where he has been held out as having such authority. In a nontrading partnership the mere fact that one partner manages the business does not give him power to borrow money or execute firm notes.[61] By the weight of authority a managing partner can not make an assignment for benefit of creditors.[62] Other cases hold that he has such right, at least if the firm is insolvent and some of the partners are nonresidents of the state,[63] or there is no fraud as to the other partner.[64] A managing partner in a lumber firm can not bind his copartners by a contract of guaranty.[65] A managing partner may bind an inactive partner by transactions as to individual property used in the firm business if the proceeds are used for the firm.[66] He has no authority to consent to an adjudication in bankruptcy.[67] A single partner can not revoke the authority of the managing partner by acting independently of the other partners.[68] If a managing partner can not show accounts where it is his duty to keep them he will be denied credit.[69] The managing partners of a bank who loaned part of its funds at two per cent. to another bank in

[57] Anderson v. Clayton (Utah), 117 Pac. 41.

[58] Miller v. McCord (Tex. Civ. App.), 159 S. W. 159; Salt Lake City Brewing Co. v. Hawke, 24 Utah 199, 66 Pac. 1058.

[59] First Nat. Bank v. Grignon, 7 Idaho 646, 65 Pac. 365; Lindh v. Crowley, 29 Kans. 756; Odiorne v. Maxcy, 15 Mass. 39.

[60] Citizens' Commercial &c. Bank v. Platt, 135 Mich. 267, 97 N. W. 694.

[61] Carlton v. Cone (Colo. App.), 146 Pac. 789; Third Nat. Bank v. Fultz, 115 Mo. App. 42, 90 S. W. 755.

[62] Callahan v. Heinz, 20 Ind. App. 359, 49 N. E. 1073; Hook v. Stone, 34 Mo. 329.

[63] H. B. Clafflin Co. v. Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. 686; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210.

[64] Keller v. Smith, 20 Tex. Civ. App. 314, 49 S. W. 263.

[65] Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co., 86 Mo. App. 438.

[66] Cobb v. Sparr, 153 Ill. App. 92.

[67] Steiner v. Faulk, 222 Fed. 61.

[68] Lerch v. Bard, 177 Pa. St. 197, 35 Atl. 714.

[69] Gay v. Householder, 71 W. Va. 277, 76 S. E. 450.

which they were interested, when all other funds of the bank were loaned at six per cent., must make good the loss to a co-partner.[70]

§ 418. Restrictions of partner's authority.—As between the partners the powers of any of them or each of them to make contracts for the firm may be restricted either by the partnership agreement or by other contract.[71] However, as contracts entered into by a member of a copartnership, within the scope of his authority, are binding upon all the partners as a firm,[72] and third persons have the right to place a good-faith reliance in the apparent scope of the partner's authority.[73] A third person is not bound by a secret agreement between the partners whereby the authority of one or more of them is restricted, where such third person deals with the partner whose authority has been restricted without notice of such restriction.[74] And

[70] Horn v. Lupton, 182 Ind. 355, 105 N. E. 237.

[71] Everitt v. Chapman, 6 Conn. 347; Powell Hardware Co. v. Mayer, 110 Mo. App. 14, 83 S. W. 1008; McGovern v. Mattison, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589.

[72] Clark v. Ball, 34 Colo. 223, 82 Pac. 529, 2 L. R. A. (N. S.) 100, 114 Am. St. 154. See cases cited in preceding sections this chapter.

[73] Green v. Ervin, 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015. See also Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Hoskinson v. Eliot, 62 Pa. St. 393; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

[74] Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Rocky Mountain Nat. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157; Bass Dry Goods Co. v. Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Evans v. Evans, 82 Iowa 492, 48 N. W. 929; Medberry v. Soper, 17 Kans. 369; Sanfley v. Howard, 7 Dana (Ky.) 367; Harrison v. Poole, 4 Rob. (La.) 193; Maltby v. Northwestern Va. R. Co., 16 Md. 422; Stinson v. Whitney, 130 Mass. 591; Hotchin v. Kent, 8 Mich. 526; Lynch v. Thompson, 61 Miss. 354; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Bates v. Forcht, 89 Mo. 121, 1 S. W. 120; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467; Ben-

the burden of proof as to knowledge of such restriction is on the party setting up the restriction.[75] But one who has notice of restrictions on a partner's authority and enters into a contract with him beyond his authority is bound by such notice, and can hold only the partner with whom he contracted and the firm as a whole or the other members are not bound.[76] The rule is thus stated in the Uniform Partnership Act: "No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction."[77] As a general rule, a partner who directly notifies a person about to contract with another partner that he will not be bound by the act of his partner in such matter is not liable on a contract made in disregard of such notice,[78] as where one partner

ninger v. Hess, 41 Ohio St. 64; Moorehead v. Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435; Hoskinson v. Eliot, 62 Pa. St. 393; Edwards v. Tracy, 62 Pa. St. 374; Nichols v. Cheairs, 4 Sneed. (Tenn.) 229; Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336; Cox v. Hickman, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47, 30 L. J. C. P. 125, 7 Jur. (N. S.) 105, 8 W. R. 754. "A mercantile instrument given in the partnership name binds all the partners, unless the person who took it knew, or had reason to believe, that the partner who made it, was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice, of his associates." Cotton v. Evans, 21 N. Car. 284.

[75] Little v. Britton (Ala.), 66 So. 694.

[76] Shackelford v. Williams, 182 Ala. 87, 62 So. 54; Barwick v. Alderman, 46 Fla. 433, 35 So. 13; Radcliffe v. Varner, 55 Ga. 427; Straus v. Kohn, 83 Ill. App. 497; Campbell v. Pence, 118 Ind. 313, 20 N. E. 840; Thomas v. Hardsocg, 137 Iowa 597, 115 N. W. 210; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Brent v. Davis, 9 Md. 217; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; Gladstone Exch. Nat. Bank v. Keating, 94 Mich. 429, 53 N. W. 1110; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358; First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Langan v. Hewett, 13 Sm. & M. (Miss.) 122; Mason v. Partridge, 66 N. Y. 633; Granby Min. &c. Co. v. Laverty, 159 Pa. St. 287, 28 Atl. 207; Chapman v. Devereux, 32 Vt. 616; Barton v. Ash (Tex. Civ. App.), 154 S. W. 608; Alderson v. Pope, 1 Camp. 404; Gallway v. Mathew, 1 Camp. 403, 10 East 264, 10 R. R. 289.

[77] Uniform Partnership Act, § 9 (4).

[78] Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157; H. Y. McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Carr v. Hertz, 54 N. J. Eq. 127, 33 Atl. 194, 37 Atl. 1117; Sladden v. Lance, 151 N. Car. 492, 66 S. E. 449; Yeager v. Wallace, 57 Pa. St. 365; Sims v. Smith, 12 Rich. L. (S. Car.)

notifies a party that he will not be liable for goods sold to his copartner,[79] or for drafts drawn by him in the firm name.[80] But it is held a partner can not revoke his copartner's authority to collect firm debts by merely notifying debtors not to pay him.[81] And a partner who objected to his copartner borrowing money can not defend on that ground when the money was used for the firm.[82] Notice may be oral.[83]

§ 419. Liability of firm on partner's individual contracts. —Although a firm has the use and benefit of goods purchased or money borrowed on a contract made by a partner on his personal credit, and in his individual capacity, this is not enough to make it liable on such contract.[84] But in Louisiana it seems the partnership is bound if benefited by the contract.[85] The firm may adopt such a contract, and thus become bound if bene-

685; Rooth v. Quin, 7 Price 193; Willis v. Dyson, 1 Stark. 164.

[79] Bradley Fertilizer Co. v. Pollock, 104 Ala. 402, 16 So. 138; Campbell v. Bowen, 49 Ga. 417; Dawson Blakemore & Co. v. Elrod, 105 Ky. 624, 49 S. W. 465, 20 Ky. L. 1436, 88 Am. St. 320; St. Louis Brewing Assn. v. Elmer (Mo. App.), 175 S. W. 102.

[80] Matthews v. Dare, 20 Md. 248.

[81] Steele v. First Nat. Bank, 60 Ill. 23. See also Brooks v. Lovelace, 6 Ky. Law 367, 13 Ky. Opin. 103.

[82] Tyler v. Tyler, 78 Mo. App. 240.

[83] St. Louis Brewing Assn. v. Elmer (Mo. App.), 175 S. W. 102.

[84] In re Roddin, 6 Biss. (U. S.) 377, Fed. Cas. No. 11989; Pritchett v. Pollock, 82 Ala. 169, 2 So. 735; Burt v. Collins, 64 Cal. xvii, 3 Pac. 128; Fisher v. Hume, 6 Mackey (D. C.) 9; Floyd v. Wallace, 31 Ga. 688; Funk v. Babbitt, 55 Ill. App. 124 (affd. 156 Ill. 408, 41 N. E. 166); Goodenow v. Jones, 75 Ill. 48; Bird v. Lanius, 7 Ind. 615; Hubenthal v. Kennedy, 76 Iowa 707, 39 N. W. 694; McDonald v. Parker, Ky. Dec. 208; Clark v. Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. 498; Smith v. Sheridan, 175 Mich. 391, 141 N. W. 684; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67; National Bank v. Thomas, 47 N. Y. 15; Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Peterson v. Roach, 32 Ohio St. 374, 30 Am. Rep. 607; Ah Lep v. Gong Choy, 13 Ore. 205, 9 Pac. 483; In re North Pennsylvania Coal Co.'s Appeal, 45 Pa. St. 181, 84 Am. Dec. 487; Harris v. Miller, Meigs (Tenn.) 158, 33 Am. Dec. 138; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192; Hudson's Bay Co. v. Stewart, 6 Manitoba 8.

[85] Hamilton v. Hodges, 30 La. Ann. 1290; Roth v. Moore, 19 La. Ann. 86. See also Tucker v. Peaslee, 36 N. H. 167.

fited.[86] The other partners may become estopped from denying that the transaction was that of the firm.[87] Especially when a partner has entered into a contract before the formation of the partnership the courts are reluctant to hold the firm liable, even though the property obtained by the contract finally comes to the firm.[88]

§ 420. Contracts between firms having common partner. —In equity, contracts between firms having common partners are enforcible.[89] The fact that there is a common partner does not make one firm liable for the others' transactions,[90] but by adoption or ratification it may become liable.[91] In case the common partner has made the contract and both firms have the same name, the firm with whose business the contract was connected and for

[86] Markham v. Hazen, 48 Ga. 570; Smith v. Hood, 4 Ill. App. 360; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622; Dix v. Otis, 5 Pick. (Mass.) 38; Habig v. Layne, 38 Nebr. 743, 57 N. W. 539; Ross v. Whitefield, 56 N. Y. 640; Westcott v. Price, Wright (Ohio) 220; Nichols v. English, 3 Brewst. (Pa.) 260; Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea (Tenn.) 358.

[87] Newsome v. Brazell, 118 Ga. 547, 45 S. E. 397; Gormley v. Hartray, 92 Ill. App. 115; White Mountain Bank v. West, 46 Maine 15; Miller v. McCord (Tex. Civ. App.), 159 S. W. 159.

[88] Baxter v. Plunkett, 4 Houst. (Del.) 450; Wittram v. Van Wormer, 44 Ill. 525; Hoffman v. Smith, 94 Iowa 495, 63 N. W. 182; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Wells v. Siess, 24 La. Ann. 178; Metzner v. Baldwin, 11 Minn. 150; Callaway v. Woodward, 28 Mo. App. 320; Bannister v. Miller, 54 N. J. Eq. 121, 701, 32 Atl. 1066; Maddock v. Steel, 81 Hun 509, 31 N. Y. S. 219; Pierce v. Alspaugh, 83 N. Car. 258; Donnally v. Ryan, 41 Pa. St. 306; Morlitzer v. Bernard, 10 Heisk. (Tenn.) 361; Filter v. Meyer, 16 Tex. Civ. App. 235, 41 S. W. 152; Davis v. Evans, 39 Vt. 182.

[89] Fulton v. Williams, 11 Cush. (Mass.) 108; Burrows v. Leech, 116 Mich. 32, 74 N. W. 296; Tutt v. Addams, 24 Mo. 186.

[90] Robbins v. Crandall, 70 Ill. 300; Cobb v. Illinois Cent. R. Co., 38 Iowa 601; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Hall v. Glessner, 100 Mo. 155, 13 S. W. 349; Wright v. Ames, 4 Abb. Dec. 644, 2 Keyes (N. Y.) 221; Toland v. Lutz, 2 Ohio C. C. 453, 1 Ohio Dec. 584; Wilkins v. Boyce, 3 Watts (Pa.) 39; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253.

[91] Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Waite v. High, 96 Iowa 742, 65 N. W. 397; Youmans v. Moore, 69 S. Car. 350, 48 S. E. 283.

which it purported to be made will be held liable.[92] And if it purported to be made for one firm but was actually made for the other, the firm for which it purported to be made is liable to one without notice.[93] One who knows that two firms with a common member are distinct, must use ordinary care to find out with which one he is dealing.[94] But if the contract is apparently within the scope of business of the firm with which, in the exercise of reasonable care he supposed himself dealing, all members of that firm are liable to him.[95] If the common partner acts for both firms in making a contract, and in any manner defrauds one as by using firm property of one to pay an individual debt to the other, the transaction is voidable.[96] A partner in one firm does not need to give notice that he is not a partner in a new firm which his copartner enters.[97] As a general rule, the common member or members can not hold the other members of one firm on a note given by the common member to secure a debt of the other firm.[98] But the rule may be different if both firms are engaged in the same business and one firm is a member of the other.[99]

§ 421. **Power to sign firm name.**—The right to incur firm obligations would be of little value if the power of the partner incurring the debt to sign the firm name to the instrument evidencing the obligation were denied. Hence the rule has grown up that a partner may sign the firm name to such contracts as he may be authorized to enter into and the firm will be bound

[92] Hastings Nat. Bank v. Hibbard, 48 Mich. 452, 12 N. W. 651.

[93] Baker v. Nappier, 19 Ga. 520; Swan v. Steele, 7 East. 209, 3 Smith 199, 8 R. R. 618.

[94] Central Nat. Bank v. Frye, 148 Mass. 498, 20 N. E. 325; Cushing v. Smith, 43 Tex. 261.

[95] Baker v. Nappier, 19 Ga. 520; Crane Bros. Mfg. Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Masterson v. Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505.

[96] Gray v. Church, 84 Ga. 125, 10 S. E. 539, 20 Am. St. 348; Schnebly v. Culter, 22 Ill. App. 87; McClurken v. Byers, 74 Pa. St. 405; Wade v. Kendrick, 37 Can. S. Ct. 32.

[97] Mears v. James, 2 Nev. 342; Jones v. O'Fatrel, 1 Nev. 354.

[98] Elkin v. Green, 13 Bush (Ky.) 612; Broughton v. Sumner, 80 Mo. App. 386.

[99] McLaughlin v. Mulloy, 14 Utah 490, 47 Pac. 1031.

thereby.[1] But the firm will not be bound when one partner signs the firm name to contracts relating to transactions outside the partnership business or which on their face are those of the individual partners.[2] Where the firm has adopted a firm name, one partner ordinarily can not bind the firm by a contract in a name other than the firm name, unless immaterially different,[3] or the use of such name has been assented to by the other partners.[4] The firm may be bound by an instrument signed by the partners as individuals, if the party seeking to hold the firm can show that it was in fact intended as a firm obligation and that it was executed in a firm transaction.[5] If the name of an individual partner or former partner is used as a firm name the firm is bound thereby.[6] When a partner signs a contract in his individual name, which is not also the firm name, the presumption is he intended to bind himself individually,[7] but the

[1] George v. Tate, 102 U. S. 564, 26 L. ed. 232; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Haskins v. D'Este, 133 Mass. 356; Lamwersick v. Boehmer, 77 Mo. App. 136; Payn v. Ronan, 47 Hun 637, 14 N. Y. St. 339; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000, 134 Am. St. 987; Fichthorn v. Boyer, 5 Watts (Pa.) 159, 30 Am. Dec. 300; Venable v. Levick, 2 Head (Tenn.) 351; Gordon v. Buchanan, 5 Yerg. (Tenn.) 71; Hawkins v. Blackford, 1 L. J. (O. S.) Ch. 142.

[2] Scott v. Dansby, 12 Ala. 714; Leckie v. Scott, 10 La. 412; Hilliker v. Francisco, 65 Mo. 598; Merchant v. Belding, 49 How. Pr. (N. Y.) 344; Marsh v. Joseph (1897), 1 Ch. 213, 75 L. T. 558, 45 W. R. 209.

[3] Tilford v. Ramsey, 37 Mo. 563; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Williamson v. Johnson, 1 B. & C. 146, 2 D. & R. 281, 1 L. J. (O. S.) K. B. 65, 25 R. R. 336.

[4] Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Palmer v. Stephens, 1 Denio (N. Y.) 471; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; Faith v. Richmond, 11 A. & E. 339, 3 P. & D. 187, 9 L. J. Q. B. 97; Nortin v. Seymour, 3 C. B. 792, 16 L. J. C. P. 100, 11 Jur. 312.

[5] Horton v. Smith, 12 Ga. App. 232, 77 S. E. 9; Cherry Lake Turpentine Co. v. Lanier Armstrong Co., 10 Ga. App. 339, 73 S. E. 610; Dreyfus v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Kitner v. Whitlock, 88 Ill. 513; Carson v. Byers, 67 Iowa 606, 25 N. W. 826; Berkshire Woolen Co. v. Juillard, 75 N. Y. 535, 31 Am. Rep. 488; Salt Lake City Brewing Co. v. Hawke, 24 Utah 199, 66 Pac. 1058.

[6] Palmer v. Stephens, 1 Denio (N. Y.) 471; Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; Crable v. O'Connor 21 Wyo. 460, 133 Pac. 376; South Carolina Bank v. Case, 8 B. & C. 427.

[7] Marvin v. Buchanan, 62 Barb.

contract may be shown to be a partnership contract.[8] It has been held that a partnership may sign a bond in the firm name without the individual partners signing.[9] Where the certificate of two architects who are partners is provided for, and the certificate is signed by one of them in the firm name, this will be sufficient.[10] The certificate of acknowledgment of a deed by partnership, in the firm name, should show by which member of the firm the signature was made and acknowledged,[11] but it need not state that the signing partner was authorized by the others to sign his name to the instrument.[12] One partner has no right to sign another's individual name without his consent.[13]

§ 422. Power to execute instrument under seal.—The common law rule and the one generally followed where not changed by statute is that one partner can not bind the firm by the execution of an instrument under seal unless expressly authorized.[14] The fact that the partnership agreement is under

(N. Y.) 468; Smith v. Hoffman, 2 Cranch (U. S.) 651, Fed. Cas. No. 13061; Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944.

[8] Farnsworth v. Trust &c. Co., 211 Fed. 912, 128 C. C. A. 290; Mock v. Stoddard, 177 Fed. 611; Horton v. Miller, 84 Ala. 537, 4 So. 370; Snead v. Barringer, 1 Stew. (Ala.) 134; Tate v. Holly, 21 Colo. App. 451, 122 Pac. 58; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Burnley v. Rice, 18 Tex. 481.

[9] Claflin v. Hoover, 20 Mo. App. 314. But in Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665, where a firm's name was signed by one of the partners without authority, the bond was held void.

[10] Lull v. Korf, 84 Ill. 225.

[11] Sloan v. Owens &c. Mach. Co., 70 Mo. 206; Leon & H. Blum Land Co. v. Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473.

[12] National Bank v. Scriven, 63 Hun 375, 18 N. Y. S. 277, 44 N. Y. St. 331.

[13] Baker v. Seaweard (Ore.), 136 Pac. 870; United States v. Astley, 3 Wash. (U. S.) 508, Fed. Cas. No. 14472.

[14] Adams v. Deckers Valley Lumber Co., 202 Fed. 48, 120 C. C. A. 302; Layton v. Hastings, 2 Har. (Del.) 147; Montgomery v. Boone, 2 B. Mon. (Ky.) 244; Armstrong v. Robinson, 5 Gill & Johns. (Md.) 412; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Fox v. Norton, 9 Mich. 207; Smith v. Tupper, 4 Sm. & M. (Miss.) 261, 43 Am. Dec. 483; Henry County v. Gates, 26 Mo. 315; Arnold v. Stevenson, 2 Nev. 234; McBride v. Hagan, 1 Wend. (N. Y.) 326; Wharton v. Woodburn, 20 N. Car. 647; James v. Bostwick, Wright (Ohio) 142; Schmertz v. Shreeve, 62 Pa. St. 457, 1 Am. Rep. 439; Hart v. Withers, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382; Gerard v. Basse,

seal is not sufficient authorization.[15] Generally, however, if the copartner has previously assented, one partner may bind the firm by a sealed instrument made in the course of the firm's business in its name and for its use.[16] The copartner may in terms or by his conduct ratify the other partner's act in executing a sealed instrument in the firm name.[17] Under some codes one partner may bind the firm by executing a sealed instrument without written authority.[18] It is generally true that one partner may, in the furtherance of the partnership business and for its benefit, execute a deed under seal which will be binding on the other if he has foreknowledge or subsequently ratifies it, and this may be proved by acts and circumstances or by his verbal declarations and admissions.[19] It has been held in some

1 Dall. (Pa.) 119, 1 L. ed. 63, 1 Am. Dec. 226; Lucas v. Sanders, 1 McMul. (S. Car.) 311; Lambden v. Sharp, 9 Humph. (Tenn.) 224; Slov v. Powell, Dall. Dig. (Texas) 467; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303; Steiglitz v. Eggington, Holt. N. P. 141, 17 R. R. 620; Logan v. Stranahan, 12 U. C. Q. B. 15.

[15] Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Harrison v. Jackson, 7 Term. Rep. 207, 4 R. R. 422.

[16] Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. ed. 797; United States v. Brod, Fed. Cas. No. 14653; Grady v. Robinson, 28 Ala. 289; Day v. Lafferty, 4 Ark. 450; Jeffreys v. Coleman, 20 Fla. 536; Wilcox v. Dodge, 12 Ill. App. 517; Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Herzog v. Sawyer, 61 Md. 344; Swan v. Stedman, 4 Metc. (Mass.) 548; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Smith v. Kerr, 3 N. Y. 144; Person v. Carter, 7 N. Car. 321; Bond v. Aitkin, 6 Watts & S. (Penn.) 165, 40 Am. Dec. 550; Lucas v. Sanders, 1 McMul. (S. Car.) 311; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[17] United States v. Turner, 2 Bond 379, Fed. Cas. No. 16547; Gunter v. Williams, 40 Ala. 561; Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Peine v. Weber, 47 Ill. 41; Swan v. Stedman, 4 Metc. (Mass.) 548; Sterling v. Bock, 40 Minn. 11, 41 N. W. 236; Gates v. Graham, 12 Wend. (N. Y.) 53; Johns v. Battin, 30 Pa. St. 84; Sibley v. Young, 26 S. Car. 415, 2 S. E. 314; Lowery v. Drew, 18 Tex. 786; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303; Mann v. Ætna Ins. Co., 40 Wis. 549; Tupper v. Foulkes, 9 C. B. (N. S.) 797, 30 L. J. C. P. 214, 7 Jur. (N. S.) 709, 3 L. T. 741, 9 W. R. 349.

[18] Fincher v. Hanson, 12 Ga. App. 608, 77 S. E. 1068.

[19] Peine v. Weber, 47 Ill. 41; Kendall v. Carland, 5 Cush. (Mass.) 74; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; McIntyre v. Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; Cady v. Shep-

jurisdictions that authority or ratification under seal is necessary before a partner can bind copartners by an instrument under seal.[20] The seal may be rejected as surplusage, if the instrument would be valid without it and the firm thus held.[21] It has been denied that this rule applies to a bill of exchange as an executory contract, though the single partner had the authority to execute a promissory note, and recovery on the instrument, as a simple contract has been refused, as well as recovery on it as a specialty,[22] and as to other executory contracts, on which a seal is not essential to validity, recovery has been denied, since the seal changed the nature of the contract and imports a consideration.[23] The sealed instrument binds the partner who executed it.[24] The signing of an instrument under seal by a part

herd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Metc. (Mass.) 548; Dillon v. Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

[20] Cummins v. Cassily, 5 B. Mon. (Ky.) 74; Trimble v. Coons, 2 A. K. Marsh. (Ky.) 375, 12 Am. Dec. 411; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677; Preston v. Hull, 23 Grat. (Va.) 600, 14 Am. Rep. 153, 12 Am. L. Reg. (O. S.) 699; Hamilton Provident &c. Soc. v. Steinhoff, 23 Ont. App. 184; Edwards v. Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199; Price v. Alexander, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; Sterling v. Bock, 40 Minn. 11, 41 N. W. 236; Human v. Cuniffe, 32 Mo. 316; Patten v. Kavanaugh, 11 Daly (N. Y.) 348; Cowan v. Cunningham, 146 N. Car. 453, 59 S. E. 992; Purviance v. Sutherland, 2 Ohio St. 478. See Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75; Schneider v. Schmidt, 82 N. J. Eq. 81, 88 Atl. 179.

[21] Merchants &c. Bank v. Johnston, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969n, 14 Ann. Cas. 546.

[22] Clement v. Brush, 3 Johns. Ca. (N. Y.) 180; Hall v. Young, 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521; Sibley v. Young, 26 S. Car. 415, 2 S. E. 314; Waugh v. Carriger, 1 Yerg. (Tenn.) 31; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677. Compare Hoskinson v. Eliot, 62 Pa. St. 393.

[23] Boyd v. Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. 685; Schmertz v. Shreeve, 62 Pa. St. 457, 1 Am. Rep. 439.

[24] United States v. Lawrence, 14 Blatchf. (U. S.) 229, Fed. Cas. No. 15574; Settle v. Davidson, 7 Mo. 604; Fletcher v. Vanzant, 1 Mo. 196; James v. Bostwick, Wright (Ohio) 142; Bowker v. Burdekin, 12 L. J. Exc. 329, 11 M. & W. 128; Moor v. Boyd, 23 U. C. Q. B. 459. Contra: Fisher v. Pender, 52 N. Car. 483; Hart v. Withers, 1 Pen. & W. (Pa.) 285, 21 Am. Dec. 382.

ner's agent in his presence at his behest is the partner's act.[25] One way of executing a sealed instrument by partnership is to recite in the body of it the names of the partners and the statement that they composed a firm, and for each partner to sign it and seal it with his individual seal.[26]

§ 423. **Power to incur firm debt.**—Under present business conditions it is practically impossible to conduct business upon a cash basis, and consequently it is necessary for a partnership to incur debts, and the rule of mutual agency in the absence of an agreement to the contrary gives each partner the power to incur debts for the firm. The rule is an ancient one, and as early as 1808,[27] Lord Ellenborough, in deciding a case where one partner purchased goods used in the business of the partnership, ostensibly for the partnership, and converted the goods to his own use, said: "Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership." A still earlier case,[28] decided by Lord Kenyon in 1795, held that where one partner borrowed money for partnership expenses, and on its account it was competent for the partner incurring the expense and securing the loan, to bind the partnership to the payment of the debt so contracted. The power of partners to incur firm debts as to all matters within the apparent scope of his authority has undergone little, if any, change since the time of the early cases given above, and the rule is firmly established and well recognized at the present time.

[25] Merchants &c. Bank v. Johnston, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969n, 14 Ann. Cas. 546.

[26] Adams v. Deckers Valley Lumber Co., 202 Fed. 48.

[27] Bond v. Gibson, 1 Camp. 185, 10 R. R. 665.

[28] Rothwell v. Humphreys, 1 Esp. 406.

§ 424. **Power to borrow money.**—In general, a commercial partnership will be liable for money borrowed by one of its members on the credit of the firm,[29] for commercial partnerships are engaged in buying and selling, and, within the scope of buying and selling, it is an incident of the business to borrow money, therefore, the power to borrow money for the firm, and authority to bind the firm by the loan is implied in each partner.[30] Moreover, the lender, in order to charge all of the several partners, is not required to see that the money thus borrowed is applied to partnership purposes.[31] All that is necessary is that

[29] Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432 and note; Rouse v. Hughes, 1 Ky. L. (abstract) 320; Cohen v. Miller, 46 Misc. 106, 91 N. Y. S. 345; Real Estate Investment Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855; Steel v. Jennings, Cheves (S. Car.) 183; Gavin v. Walker, 14 Lea (Tenn.) 643; Keeler v. Mathews, 17 Vt. 125; Freeman v. Carpenter, 17 Wis. 126. See also Bank of Guntersville v. Webb, 108 Ala. 132, 19 So. 14; Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177; Heitman v. Griffith, 43 Kans. 553, 23 Pac. 589; Deitz v. Regnier, 27 Kans. 94; Willson v. Whaley's Admr., 7 Ky. L. (abstract) 527; Brite v. Guy, 28 Ky. L. 57, 88 S. W. 1069; Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627, 6 Det. Leg. N. 148; Burchell v. Voght, 164 N. Y. 602, 58 N. E. 1085; Maffet v. Lenckel, 93 Pa. St. 468; Phillips v. Stanzell (Tex. Civ. App.), 28 S. W. 900; Caraway v. Citizens' Nat. Bank (Tex. Civ. App.), 29 S. W. 506; Morse v. Hagenah, 68 Wis. 603, 32 N. W. 634. It has been held, however, by the Supreme Court of Mississippi that the "custom" of one partner, concurred in by the other, "to draw drafts, sign contracts, buy cotton, and otherwise generally supervise the business," does not invest him with the right, denied him by the partnership agreement, to borrow money without his copartner's consent. King v. Levy (Miss.), 13 So. 282. For definition of commercial partnership, see Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313; Union Nat. Bank v. Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426n; Leffler v. Rice, 44 Ind. 103; Heitman v. Griffith, 43 Kans. 553, 23 Pac. 589; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Feigenspan v. McDonald, 201 Mass. 341, 87 N. E. 624; Phipps v. Little, 213 Mass. 414, 100 N. E. 615; Hoskinson v. Eliot, 62 Pa. St. 393; Coller v. Porter, 88 Mich. 549, 50 N. W. 658; Inman v. Brookman, 28 S. Dak. 361, 133 N. W. 810; Miller v. McCord (Tex. Civ. App.), 159 S. W. 159; Progressive Lumber Co. v. Rogers (Tex. Civ. App.), 120 S. W. 260; Keeler v. Mathews, 17 Vt. 125; Paterson v. Maughan, 39 U. C. Q. B. 371.

[30] Sylverstein v. Atkinson, 45 Miss. 81.

[31] Rouse v. Hughes, 1 Ky. L. (abstract) 320; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111,

he act in good faith and without knowledge, actual or constructive, that the borrower intends to use the money to further his own individual interests.[32] But if the lender, at the time of making the loan, knows or has reason to believe that the partner is seeking to obtain money for his individual benefit, or that the transaction is out of the ordinary course of business, then the firm is not liable.[33] But the general rule is that this implied power to borrow money does not obtain when the firm is of a nontrading character. Such partnerships are not engaged in trade or in buying and selling, and whenever there is occasion for the firm to borrow money, it is so out of the ordinary scope of the firm business that the consent of all partners is necessary.[34] In case of a nontrading partnership, it is usually a question of fact for the jury as to whether a partner has power

985, 8 L. R. A. 677, 25 Am. St. 565; Reed v. Bacon, 175 Mass. 407, 56 N. E. 716; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Cohen v. Miller, 46 Misc. 106, 91 N. Y. S. 345; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Benninger v. Hess, 41 Ohio St. 64; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

[32] Chicago Trust &c. Bank v. Kinnare, 174 Ill. 358, 51 N. E. 607; Lindh v. Crowley, 29 Kans. 756; Warren v. French, 6 Allen (Mass.) 317; Coller v. Porter, 88 Mich. 549, 50 N. W. 658; Potter v. Dillon, 7 Mo. 228, 37 Am. Dec. 185; Klopfer v. Levi, 33 Mo. App. 322; Church v. Sparrow, 5 Wend. (N. Y.) 223; Best v. Starks, 24 How. Pr. (N. Y.) 58; Gavin v. Walker, 14 Lea (Tenn.) 643; Phillips v. Stanzell (Tex. Civ. App.), 28 S. W. 900; Kelton v. Leonard, 54 Vt. 230; Rothwell v. Humphreys, 1 Esp. 406.

[33] Bascom v. Young, 7 Mo. 2.

[34] See §§ 425, 426, on negotiable instruments for examples of trading and nontrading partnerships. See also Dowling v. National Exchange Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928; McCrary v. Slaughter, 58 Ala. 230; Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Gray v. Ward, 18 Ill. 32; Lee v. First Nat. Bank, 45 Kans. 8, 25 Pac. 196, 11 L. R. A. 238; Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185; Cooper v. Nelson, 12 Ky. L. (abstract) 890; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565; Prince v. Crawford, 50 Miss. 344; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Webb v. Allington, 27 Mo. App. 559; Levi v. Latham, 15 Nebr. 509, 19 N. W. 460, 48 Am. Rep. 361; Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Randall v. Meredith, 76 Tex. 669, 13

to bind the firm for a loan,[35] and the burden of proving authority or assent of the other members is upon one who seeks to hold a nontrading partnership liable upon a loan negotiated by one partner.[36] However, there is authority for the proposition that a "Star Route" partnership will be liable for a loan obtained by one of its members for the benefit of the firm,[37] furthermore, since one may ordinarily do through another that which he may do in person, a partner may direct an agent of the firm to obtain a loan in its behalf.[38] Again, it has been held that a partnership can not escape liability on the ground either that its managing member who procured the loan had served as counsel for the one from whom the money was obtained in the adjudication of her father's estate,[39] or that the partner who borrowed the money was insane, although not an adjudged lunatic at the time the loan was made.[40] A firm is not bound where a partner borrows money on firm credit if the borrowing of money is not within the scope and course of the partnership business as similar businesses are usually conducted, unless the other partners with knowledge have seen the money applied to the use of the firm or have otherwise ratified the loan.[41] The ultimate use by the firm of money loaned to a partner individually on his own

S. W. 576; Walker v. Walker, 66 Vt. 285, 29 Atl. 146; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[35] Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185.

[36] Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185; Prince v. Crawford, 50 Miss. 344; Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Levi v. Latham, 15 Nebr. 509, 19 N. W. 460, 48 Am. Rep. 361; National State Capital Bank v. Noyes, 62 N. H. 35; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[37] Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209. See also Hoskinson v. Eliot, 62 Pa. St. 393.

[38] Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209.

[39] Lerch v. Bard, 177 Pa. St. 197, 35 Atl. 714.

[40] Van Brunt v. Taylor, 3 Phila. (Pa.) 123.

[41] Chandler v. Sherman, 16 Fla. 99; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Powell Hardware Co. v. Mayer, 110 Mo. App. 14, 83 S. W. 1008; Tyler v. Tyler, 78 Mo. App. 240; Maffet v. Lenckel, 93 Pa. St. 468; Anderson v. Norton, 15 Lea (Tenn.) 14, 54 Am. Rep. 400; Miller v. McCord (Tex. Civ. App.), 159 S. W. 159; Ricketts v. Bennett, 4 C. B. 686, 11 Jur. 1062, 17 L. J. C. P. 17; Lloyd v. Freshfield, 2 Car. & P. 325, 8 D. & R. 19; Fisher v. Tay-

credit does not make the firm liable for the loan.[42] This rule applies also where a partner borrowed money in the firm name with knowledge of the lender that it was for individual use to pay his share of capital stock, although the firm may ultimately have the use of the money.[43] Where one partner has authority to borrow money for the firm, the fact that the other partners did not know of the loan until long after, does not prevent them being liable.[44] Especially where a loan is made before a partnership was formed, the partnership is not liable where money was borrowed by a partner individually, although it was used for the firm.[45] There is no implied power in a member of an agricultural partnership to borrow money and bind the firm, for such a practice is not usual, nor necessary for carrying on farming,[46] but where a farming partnership carries on other business so that buying and selling is incidental thereto, then the power to borrow money exists.[47]

§ 425. Power to make negotiable paper.—Associated very closely with the right of a member of a commercial partnership to borrow money in the firm name, is his right to execute negotiable paper for a partnership indebtedness. The giving of negotiable paper is as much an incident to the business of such a partnership as is the power to borrow money and in a general way the same rules apply. That a partner in a commercial part-

lor, 2 Hare 218; Robertson v. Jones, 20 N. Brunsw. 267.

[42] Evans v. Bidleman, 3 Cal. 435; Klopper v. Levi, 33 Mo. App. 322; Smith v. Sheridan, 175 Mich. 391, 141 N. W. 684; Morrison v. Curry, 43 Pa. Super. Ct. 648; Johnson v. Rankin (Tenn.), 59 S. W. 638; Bevan v. Lewis, 1 Sim. 376, 27 R. R. 205; Shaw v. Codwell, 17 Can. Sup. Ct. 357. See Deland Min. & Mill. Co. v. Hanna, 112 Md. 528, 76 Atl. 850, 136 Am. St. 404.

[43] Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192.

[44] Inman v. Brookman, 28 S. Dak. 361, 133 N. W. 810.

[45] Smith v. Sheridan, 175 Mich. 391, 141 N. W. 684.

[46] Prince v. Crawford, 50 Miss. 344. But see Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

[47] Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

nership has the right to bind the firm by making negotiable paper is not open to question,[48] some courts having even gone so far as to declare that he may exercise the same without the consent and against the wishes of his associates.[49] The firm is generally liable where a negotiable note was executed by one partner with the intention of binding the firm, and was accepted for an indebtedness of the firm.[50] The difficulty arises as to what kind of business a partnership may be engaged in, to which

[48] Chitty Contracts (4th Am. ed.) *201; Wagner v. Simmons, 61 Ala. 143; Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40; Winkles v. Simpson Grocery Co., 138 Ga. 482, 75 S. E. 640; Van Brunt v. Mather, 48 Iowa 503; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Carter v. Steele, 83 Mo. App. 211; Fairchild v. Rushmore, 21 N. Y. Super. Ct. 698; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Johnston v. Dutton, 27 Ala. 245; Letson v. Hall, 1 Ala. App. 619, 55 So. 944; Decker v. Howell, 42 Cal. 636; Silverman v. Chase, 90 Ill. 37; Ditts v. Lonsdale, 49 Ind. 521; Milwaukee Harvester Co. v. Crabtree, 101 Iowa 526, 70 N. W. 704; Sherwood v. Snow, 46 Iowa 481, 26 Am. Rep. 155; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Martin v. Muncy, 40 La. Ann. 190, 3 So. 640; Coursey v. Baker, 7 Har. & J. (Md.) 28; Phipps v. Little, 213 Mass. 414, 100 N. E. 615; Richardson v. French, 4 Metc. (Mass.) 577; Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627; Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n; Carter v. Steele, 83 Mo. App. 211; Voorhees v. Jones, 29 N. J. L. 270; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Gano v. Samuel, 14 Ohio 592; Boyd v. Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. 685; Ex parte Wilson, 84 S. Car. 444, 66 S. E. 675; Bradford v. Taylor, 61 Tex. 508; Wallace v. Reed, 54 Tex. Civ. App. 457, 117 S. W. 1019; Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022; Edmunds v. Bushell, L. R. 1 Q. B. 97, 35 L. J. Q. B. 20, 12 Jur. (N. S.) 332; Lloyd v. Ashby, 2 B. & Ad. 23, 9 L. J. (O. S.) K. B. 144; Manitoba Mortg. Co. v. Montreal Bank, 17 Can. Sup. Ct. 692. That partner can not execute sealed note, see Millwee v. Jay, 47 S. Car. 430, 25 S. E. 298.

[49] Dow v. Phillips, 24 Ill 249; Dickson v. Dryden, 97 Iowa 122, 66 N. W. 148; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Martin v. Muncy, 40 La. Ann. 190, 3 So. 640; Cottam v. Smith, 27 La. Ann. 128; Partin v. Luterloh, 59 N. Car. 341; Nunn v. Lackey, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1331.

[50] Jacks v. Greenhaw, 105 Ark. 615, 152 S. W. 160; Behrenfeld v. Breedlove (Cal. App.), 150 Pac. 71; Horton v. Smith, 12 Ga. App. 353, 77 S. E. 9; Clement Nat. Bank v. Connelly (Vt.), 90 Atl. 794.

the giving of such negotiable paper would be incidental. This has been, in a general way, solved by numerous decisions. An English case,[51] decided in 1797 by Lord Kenyon, stated the rule, which it recognized as then well settled, in the following language: "The law of merchants is part of the law of the land; and, in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest." In Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes and Cheques,[52] an excellent statement is made of the law upon this subject: "A partner in a trading firm has prima facie authority to bind the firm by drawing, indorsing, or accepting bills in the firm name for partnership purposes; and if the bill gets into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it was given for partnership purposes or not. A partner in a nontrading partnership has prima facie no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible." A Connecticut case[53] cites the foregoing quotation and adds the following, in approving the rule: "Many more authorities, equally pertinent might be cited, but these will suffice to show that the distinction relied upon (between trading and nontrading firms) is supported both in England and in the United States."[54] In the succeeding section are given examples of partnerships which have been classified by the courts as trading or commercial ones and as nontrading ones. Where the act appears to have been necessary for the carrying on of the business in the usual way, the firm will be presumptively liable, notwithstanding all of the partners did not authorize it; contrariwise, if the act was not essential, or ap-

[51] Harrison v. Jackson, 7 D. & E. 207, 4 R. R. 422.

[52] 2d ed., pp. 68-69.

[53] Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

[54] Hedley v. Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 11 L. J. Q. B. 293, 6 Jur. 853; Dickinson v. Valpy, 10 Barn. & C. 128, 5 M. & Ry. 126, 8 L. J. (O. S.) K. B. 51; Levy v. Ryne, Car. & M. 453; Ulery v. Ginrich, 57 Ill. 531; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

parently essential, to the partnership pursuits.[55] The fact that the partner in a trading partnership executing a note had no actual authority to do so,[56] or that he afterward misapplied the funds obtained does not make all the partners any less liable.[57] Generally, where there has been no express authority, no assent and no course of dealing from which assent can be presumed, a partner can not bind the firm by issuing paper in the firm name without the scope of the business,[58] unless the copartners ratify the making of such paper,[59] which may be by a promise

[55] Graves v. Kellenberger, 51 Ind. 66. For acts which do not measure up to partnership transactions, see the case just cited, and also Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Brooks-Waterfield Co. v. Jackson, 21 Ky. L. 854, 53 S. W. 41; Buchanan v. Buckler, 8 Ky. L. (abstract) 617. The court in Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315, makes the statement that, "The question is one of authority to execute the note, not as to what became of the proceeds, or for whose benefit they were used." This, standing alone, is somewhat misleading by reason of the fact that it is open to misinterpretation. While the court was undoubtedly clear in its own mind as to the correct principle, it did not state the principle as clearly as it might have done. The authority of the partner as far as the promisee is concerned depends upon the apparent use to which the money is to be put. In other words, it will be vain for the promisee to attempt to hold the copartners of the maker, when he has notice that the money is to be used for such maker's personal benefit. The promisee is interested in the represented disposition of the proceeds although he may not be concerned in the matter of their actual disposition. The fraud of the partner will not jeopardize the rights of the promisee, it is true, but the latter as a reasonable, intelligent being can not assume that the partner has authority when the very purpose for which he asserts the money is to be used emphatically proclaims the contrary.

[56] First Nat. Bank of St. Paul v. Webster, 130 Minn. 277, 153 N. W. 736.

[57] Miller v. McCord (Tex. Civ. App.), 159 S. W. 159.

[58] Talmage v. Millikin, 119 Ala. 40, 24 So. 843; H. Y. McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Zuel v. Bowen, 78 Ill. 234; Durrell v. Staples, 169 Mass. 49, 47 N. E. 441; Whitla v. Butler, 99 Mich. 51, 57 N. W. 1082; Broughton v. Sumner, 80 Mo. App. 386; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Scott v. Bandy, 2 Head (Tenn.) 197; Hogarth v. Latham, 47 L. J. Q. B. 339, 3 Q. B. D. 343, 39 L. T. 75, 26 W. R. 388.

[59] In re Norris, 2 Hask. (U. S.) 19, Fed. Cas. No. 10302; Tyree v. Lyon, 67 Ala. 1; Reubin v. Cohen, 48 Cal. 545; Taylor v. Herron, 72 Kans. 652, 82 Pac. 1104; Harper v. Devene, 10 La. Ann. 724; Leonard v. Wildes, 36 Maine 265; Sedalia Third Nat. Bank

to pay, with knowledge of the facts[60] or by accepting the benefits.[61] It has been held that a partner has no right to sign notes waiving a homestead exemption, as such right is personal to the debtor,[62] but since a partnership has no right to exemptions, it has also been held that a clause waiving such exemptions does not invalidate the notes and does not affect the power of one partner to sign them as simple promissory notes.[63]

§ 426. **Power to make negotiable paper—Nontrading partnership.**—The operation of these rules, however, is, as has been indicated, restricted, and does not as a general proposition extend to partnerships of a nontrading character, since in them the execution of negotiable paper is not ordinarily incident to the business.[64] "A trading partnership or associa-

v. Faults, 115 Mo. App. 42, 90 S. W. 755; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; Mack v. Fries, 5 Ohio Dec. 174; Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350; Hull v. Young, 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521; Powell v. Messer, 18 Tex. 401; Moran Bros. v. Watson, 44 Wash. 392, 87 Pac. 508.

[60] Murphy v. Whitlow, 1 Ariz. 340, 25 Pac. 532; Wheeler v. Rice, 8 Cush. (Mass.) 205.

[61] American Exch. Bank v. Georgia Construction &c. Co., 87 Ga. 651, 13 S. E. 505; Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177; Mechanics' & Traders' Band v. Oppenheim, 38 Misc. 763, 78 N. Y. S. 825.

[62] Winkles v. Simpson Grocery Co., 138 Ga. 482, 75 S. E. 640.

[63] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[64] "There is no accurate definition of what is or is not a trading or nontrading or commercial or noncommercial partnership. The business of the world is conducted in such manner at the present day that many firms are engaged in business, a part of which is commercial or trading, and a part of which is not. A partnership may be engaged in manufacture, and at the same time be engaged in buying and selling manufactured articles not produced by themselves. As to the business exclusively relating to manufacture, the law as to nontrading partnerships will apply, while as to the business of buying and selling the manufactures of others the law of commercial or trading partnerships will apply. * * * All the authorities cited, denying the power of one partner, as a general agent, to bind the concern in borrowing money and signing mercantile paper, relate to partnerships in occupation, such as attorneys, brokers, contractors to build a road, farming or planting, mining or quarrying, livery stable, printing, real estate, insurance and collecting, tavern keeping, operating threshing machines, etc., and not the

tion is, generally speaking, one doing business commercially (a business of buying and selling for profit), while those in which the business done is something other than buying and selling for profit constitute the nontrading class."[65] It is often necessary to determine whether a trading partnership exists in deciding the liability of a partnership upon a note executed by one of the partners. It has been held that partners in firms carrying on the following businesses had power to bind the firm by giving negotiable paper. One partner in a firm of stockbrokers doing business in London and Paris may bind the partnership by drawing bills of exchange, if necessary to carry on the business;[66] a partner in manufacturing, by notes given for money for the use of the firm;[67] a partner in a ginnery and commercial business, by notes for the purchase-price of cotton;[68] a partner in a country store which also buys cotton, by notes for the purchase-price of cotton.[69] Partnerships in the following businesses have been held commercial partnerships: Manufacturing articles for sale,[70] such as refrigerators,[71] or lumber, bark and railroad ties;[72] conducting a country store;[73] dealing in dry goods;[74] a real estate, loan and insurance business;[75] plumbing contracting;[76] killing cattle for sale;[77] buying and selling cotton seed;[78] buying and selling lumber.[79] Partnerships

partnerships engaged in commerical business, like those of banking concerns." McNeal v. Gossard, 6 Okla. 363, 50 Pac. 159.

[65] Schumacher v. Sumner Telephone Co., 161 Iowa 326, 142 N. W. 1034. See also Lee v. First Nat. Bank, 45 Kans. 8, 25 Pac. 196, 11 L. R. A. 238. See cases cited in following notes.

[66] Nemeth v. Tracy, 159 App. Div. 497, 144 N. Y. S. 901.

[67] Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

[68] Thompson v. Gosserand, 131 La. 1056, 60 So. 682.

[69] First Nat. Bank of Vicksburg v. Mayer, 129 La. 981, 57 So. 308.

[70] Winship v. Bank, 5 Pet. (U. S.) 529, 8 L. ed. 216.

[71] Holt v. Simmons, 16 Mo. App. 97.

[72] Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929.

[73] Dow v. Moore, 47 N. H. 419.

[74] Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75.

[75] Adams v. Long, 114 Ill. App. 277.

[76] Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40.

[77] Wagner v. Simmons, 61 Ala. 143.

[78] Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co., 92 Ark. 271, 122 S. W. 658.

[79] First Nat. Bank of St. Paul v. Webster (Minn.), 153 N. W. 736.

engaged in the following businesses or occupations have been held not to be commercial partnerships: Sawing lumber, pickets and lath;[80] a single transaction in buying and selling timber;[81] repairing machinery and selling it on commission;[82] purchasing land;[83] buying stumpage and manufacturing and selling lumber;[84] insurance, real estate and collections;[85] photo-engraving and printing;[86] fruit raising;[87] contracting;[88] real estate and insurance;[89] conducting a theater;[90] operating a sawmill;[91] carrying on a dairy;[92] to build a bridge;[93] in a gas works;[94] in carrying on a laundry;[95] in owning a ship;[96] in sugar refining;[97] in a water-works;[98] between stevedores;[99] mining;[1] drilling wells and buying materials for pumps and windmills;[2] contracting with the government for carrying mail;[3] paving and curbing streets;[4] milling;[5] publishing;[6] digging tunnels.[7] Partnerships in farming

[80] Dowling v. National Exch. Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. ed. 795.

[81] Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255n.

[82] Faires v. Ross (Tex.), 18 S. W. 418.

[83] Schaeffer v. Fowler, 111 Pa. St. 451, 2 Atl. 558.

[84] National State Capital Bank v. Noyes, 62 N. H. 35.

[85] Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95.

[86] Randall v. Lee, 68 Mo. App. 561.

[87] McPherson v. Bristol, 115 Mich. 258, 4 Det. Leg. N. 848.

[88] Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565.

[89] Lee v. First Nat. Bank, 45 Kans. 8, 25 Pac. 196, 11 L. R. A. 238.

[90] Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

[91] Johnston v. Dutton, 27 Ala. 245.

[92] Schellenbeck v. Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. 240.

[93] Linn v. Valz, 11 Ky. L. 846.

[94] Bramah v. Roberts, 3 Bing. N. Cas. 963.

[95] Neale v. Turton, 4 Bing. 149.

[96] Williams v. Thomas, 6 Esp. 18.

[97] Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273.

[98] Broughton v. Manchester Waterworks, 3 B. & Ald. 1, 21 R. R. 278.

[99] Benedict v. Thompson, 33 La. Ann. 196.

[1] Decker v. Howell, 42 Cal. 636.

[2] Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315.

[3] Sedalia Third Nat. Bank v. Faults, 115 Mo. App. 42, 90 S. W. 755.

[4] Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565.

[5] Lanier v. McCabe, 2 Fla. 32, 48 Am. Rep. 173.

[6] Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733.

[7] Gray v. Ward, 18 Ill. 32. Compare Voorhees v. Jones, 29 N. J. L. 270.

and planting, as well as professional ones, are generally recognized as noncommercial.[8] So a partner in the practice of medicine or surgery,[9] or law,[10] is not a member of a commercial partnership, and has not the same measure of implied authority. Thus it has been said that "attorneys who are in partnership have no implied authority to become parties to negotiable instruments and bind the firm thereby. The authority to do such acts must in such cases be either expressly given, or be recognized as proper and necessary, or in the usual course of a particular business of that firm."[11] "It is generally held that nontrading firms have no power to borrow money and sign negotiable paper, and that one member of such firm has no power to bind the other members by signing the firm name to such paper. * * * This is because such transactions are not generally within the legitimate scope of the business of such firms. There is no reason why such firms should not be bound by the acts of their members within the scope of their business. This would be true even in the case of negotiable paper, where it was shown that such paper was executed within the scope of the firm's business."[12] So, too, it has been said that this "liability of a partnership upon negotiable instruments executed by one partner

[8] "Farming partnerships, when strictly confined to that purpose, are held to be within the exceptions to the general rule, upon the ground * * * that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade." Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313. See also McCrary v. Slaughter, 58 Ala. 230; Tanner v. Hyde, 2 Colo. App. 443, 31 Pac. 344; Ulery v. Ginrich, 57 Ill. 531; Freeman v. Gordon, 59 Ill. App. 189; Benton v. Roberts, 4 La. Ann. 216; Prince v. Crawford, 50 Miss. 344; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Walker's Admr. v. Walker's Estate, 66 Vt. 285, 29 Atl. 146. And compare Burnley v. Rice, 18 Tex. 481. A note given for supplies with which to carry on the planting business will bind the partnership. Selman v. Brown, 78 Ga. 332.

[9] Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613.

[10] Worster v. Forbush, 171 Mass. 423, 50 N. E. 936; Garland v. Jacomb, L. R. 8 Ex. 216, 28 L. T. 877, 21 W. R. 868; Levy v. Pyne, Car. & M. 453.

[11] Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89. See also Worster v. Forbush, 171 Mass. 423, 50 N. E. 936.

[12] Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. 73.

in the name of the firm, exists not only where the firm is a trading or commercial partnership, but 'where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur.' "[13] In other words to render one partner liable on a promissory note made by his copartner in the firm name, it must appear that the note was made in the firm business and for firm purposes.[14] A different presentation of practically this same doctrine is found in an early Illinois case in which it is declared in substance, that, in the eyes of the law, each partner possesses authority to issue notes in the name of his firm where such authority is essential to the successful conduct of the partnership business; where it is according to the usage of similar partnerships or is according to the course of trade of that particular partnership.[15] "If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it can not be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged."[16] Where the partnership business was the operation of a sawmill,

[13] Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928.

[14] Ditts v. Lonsdale, 49 Ind. 521. See also Zuel v. Bowen, 78 Ill. 234; Wiley v. Stewart, 122 Ill. 545, 14 N. E. 835; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Blodgett v. Weed, 119 Mass. 215.

[15] Gray v. Ward, 18 Ill. 32. See also Bradley v. Linn, 19 Ill. App. 322; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. Rep. 565; Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Fant v. West, 10 Rich. L. (S. Car.) 149; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[16] Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160, quoted in Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928.

one partner has authority to bind the firm by executing notes for the purchase-price of property used in the business.[17]

§ 427. Indorsement of note as accommodation or surety.—So, also, it is undoubtedly true that a partner does not as a general thing bind his associates by an accommodation indorsement in the firm name,[18] so long as such indorsement has not passed into the hands of a bona-fide indorsee for value.[19] One partner can not bind the firm by an accommodation paper,[20] and where the firm name is signed to a note by way of indorsement or surety the assent of all partners must be shown by the holder before he can recover from the firm.[21] Again it seems that the authority given the managing partner by the articles of association, to apply the proceeds of the business to, among other objects, the payment of outstanding debts of one of his copartners, is not so broad that a note given for one of such debts will be binding upon the firm.[22]

§ 428. Presumptions as to firm notes given by one partner.—But it has been held that where a person loans money to a member of a mercantile firm and receives therefor a note signed in the partnership name, he is entitled to presume that the note was executed in the course of the business of the firm and that all the partners are bound thereby.[23] Prima facie a

[17] Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[18] Talmadge v. Milliken, 119 Ala. 40, 24 So. 843; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; First Nat. Bank v. Sanders Bros., 162 Ky. 374, 172 S. W. 689; Vredenburgh v. Lagan, 28 La. Ann. 941; Union Nat. Bank v. Wickham, 18 Ohio C. C. 685, 6 Ohio C. D. 790. But see Penfield v. Mason, 17 Ohio C. Ct. 165, 9 Ohio C. D. 611.

[19] See Beach v. State Bank, 2 Ind. 488.

[20] King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; Rollins v. Stevens, 31 Maine 454; Heffron v. Hanaford, 40 Mich. 305.

[21] Clement Nat. Bank v. Connelly (Vt.), 90 Atl. 794.

[22] Whitla v. Butler's Estate, 99 Mich. 51, 57 N. W. 1082.

[23] Platt v. Koehler, 91 Iowa 592, 60 N. W. 178, following Sherwood v. Snow, 46 Iowa 481, 26 Am. Rep. 155. See Jemison v. Dearing's Exrs., 41 Ala. 283; Persons v. Oldfield, 101 Miss. 110, 57 So. 417. See also Lamwersick v. Boehmer, 77 Mo. App. 136; Kantrowitz v. Levin, 14 Misc.

firm is bound by the presence of the firm name on negotiable paper.[24] On the other hand where a partner uses the name of the firm in giving a note for a purpose entirely distinct from those of the partnership, such apparent misuse or abuse of the common name is prima facie evidence that, in that particular transaction, he acts without authority and in fraud of the partnership.[25] Moreover, where the note is of an accommodation character and the name under which the partnership business is conducted is the name of the partner making the paper, the innocent holder of the note will be required to prove that the same constitutes a firm obligation.[26]

§ 429. Bona-fide purchasers.—The fact, however, that a note was given in violation of the articles of partnership has been held no defense as against a bona-fide holder for value and before maturity.[27] "Whenever there are written articles of agreement between the partners, their power and authority, inter se, are to be ascertained and regulated by the terms and conditions of the written stipulations. * * * Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such re-

563, 35 N. Y. S. 1072, 70 N. Y. St. 716. And compare Hibbler v. De Forest, 6 Ala. 92.

[24] Persons v. Oldfield, 101 Miss. 110, 57 So. 417.

[25] Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600.

[26] Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369. See also Mechanics' & Farmers' Bank v. Dakin, 24 Wend. (N. Y.) 411. But see Beach v. State Bank, 2 Ind. 488.

[27] "If by an agreement inter se a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement." Cottam v. Smith, 27 La. Ann. 128. See Sandilands v. Marsh, 2 B. & Ald. 673; Hogg v. Skeen, 34 L. J. C. P. 153, 11 Jur. (N. S.) 244, 11 L. T. 709, 13 W. R. 383; Michigan Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

strictions have been made."[28] So where a note was given by one of the partners in the firm name to pay certain partnership expenses, and signed by him as agent, it was decided in an action thereon by a bona-fide holder, who had discounted the same, that the partner had the power to make the note and thereby bind his copartners and that the restriction on his authority contained in an agreement between the partners did not affect the plaintiff since such restriction had not been communicated to him.[29] So it has been held that the bona fide holder, for a valuable consideration without notice, of a bill of exchange indorsed by one of the partners in a certain firm, might recover the amount thereof against all the partners, notwithstanding the indorsement of the name of the firm was expressly prohibited in the articles of partnership.[30] And although partners may have agreed between themselves that no member of the firm should indorse paper to make the others liable, this will be no defense to an action on paper made payable to the firm and indorsed by one of the partners in the firm name to a bona-fide purchaser for value.[31] In the case, however, of an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the articles of association, it has been decided that the burden rests on the plaintiff to show that he gave value.[32] And the fact that a note was executed or transferred in violation of the articles

[28] Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

[29] National Union Bank v. Landon, 66 Barb. (N. Y.) 189 (affd. 45 N. Y. 410).

[30] Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 41. In Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070, it was held that where a partnership executed a firm note for money borrowed and one of the partners drew money to pay the same at maturity and entered it on the books as paid, but appropriated the money and renewed the note, his fraudulent conduct toward the firm was no defense against a holder for value before maturity and without notice. See also Albietz v. Mellon, 37 Pa. St. 367; Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Henderson v. Anderson, 3 How. (U. S.) 73, 11 L. ed. 499.

[31] Barrett v. Russell, 45 Vt. 43.

[32] Hogg v. Skeen, 34 L. J. C. P. 153, 11 Jur. (N. S.) 244, 11 L. T. 709, 13 W. R. 383. See also Dickson v. Primrose, 2 Miles (Pa.) 366.

of partnership will, it seems, be a good defense as against a holder with notice.[33]

§ 430. Power of one partner to transfer firm negotiable paper.—Any member of a trading partnership has the same implied power to transfer negotiable paper payable to the firm by indorsing it in the firm name which he has to execute such paper.[34] He may even transfer it to himself,[35] or another firm of which he is a member,[36] and the contract of indorsement will bind the firm.[37] An indorsement for his own benefit is not binding on the firm without actual authority or ratification.[38] The indorsement of firm paper by one partner in his own name does not pass full title.[39] However, a partner in a firm such that he has implied power to sell firm property may pass an equitable

[33] Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Dickson v. Primrose, 2 Miles (Pa.) 366; Gallway v. Mathew, 10 East 264, 1 Camp. 403, 10 R. R. 289.

[34] Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Fulton v. Loughlin, 118 Ind. 286, 20 N. E. 796; McGowan v. Bank of Kentucky, 5 Lit. (Ky.) 271; Emerson v. Harmon, 14 Maine 271; Mechanics' Bank v. Hildreth, 9 Cush. (Mass.) 356; Negaunee First Nat. Bank v. Freeman, 47 Mich. 408; Manchester Commercial Bank v. Lewis, 13 S. & M. (Miss.) 226; Tevis v. Tevis, 24 Mo. 535; Burnham v. Whittier, 5 N. H. 334; Kirby v. Cogswell, 1 Caines (N. Y.) 505; Moorehead v. Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435; Windham County Bank v. Kendall, 7 R. I. 77; Park v. Funderburk, 87 S. Car. 76, 68 S. E. 963.

[35] Fulton v. Loughlin, 118 Ind. 286, 20 N. E. 796; Burnham v. Whittier, 5 N. H. 334; Kirby v. Cogswell, 1 Caines (N. Y.) 505.

[36] Walker v. Kee, 16 S. Car. 76.

[37] Brown v. Torver, Minor (Ala.) 370; Meyer v. Hegler, 121 Cal. 682, 54 Pac. 271; Allen v. Mason, 17 Ill. App. 318.

[38] Newman v. Richardson, 9 Fed. 865, 4 Woods (U. S.) 81; American Exch. Nat. Bank v. Georgia Construction &c. Co., 87 Ga. 651, 13 S. E. 505; Fletcher v. Anderson, 11 Iowa 228; Blake v. Third Nat. Bank of St. Louis, 219 Mo. 644, 118 S. W. 641; Lyon v. Titch, 18 N. Y. S. 867, 46 N. Y. St. 541, 61 N. Y. Super. Ct. 74.

[39] McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; Estabrook v. Smith, 6 Gray (Mass.) 570, 66 Am. Dec. 443; McIntire v. McLaurin, 2 Humph. (Tenn.) 71, 36 Am. Dec. 300. See also Deavenport v. Green River Deposit Bank, 138 Ky. 352, 128 S. W. 88, 137 Am. St. 386, holding that a partner can not purchase an interest in a firm note and then assign or hold the firm liable on the note. The only right remaining in him is the right to enforce contributions against his consignor, and he can only recover on the basis of the amount actually paid by him.

title by such indorsement.[39a] In conformity to the general rule as to nontrading partnerships, one partner in such a firm has no implied power to transfer firm paper by indorsement.[40] But a partner may transfer paper payable to his order by indorsing in the firm name, as the firm signature includes the signature of every assenting partner.[41] An individual partner who indorses a note of the firm is under the Negotiable Instruments Act a person not otherwise a party to the instrument, and liable as an indorsee and his individual estate is liable for the claim.[42]

§ 431. **Fraudulent transfer.**—Where paper belonging to the partnership is transferred by one of the partners, it has been held that it is no defense to an action against the maker that such transfer was fraudulent as to the firm.[43] The firm will, it seems, be bound in such cases, unless the person taking the paper knew or had reason to believe that it was executed or transferred in fraud of the partnership.[44] If, however, the circumstances under which such paper was given or transferred were such as would naturally arouse suspicion so that the transferee can not be regarded as a bona-fide holder, it has been held that it may be shown that the partner acted in fraud of the firm and that the paper was given for accommodation without the firm's consent.[45] And where the holder of the paper is a party

[39a] Alabama Coal Min. Co. v. Brainard, 35 Ala. 476; McConeghy v. Kirk, 68 Pa. St. 200; Manitoba Mortgage Co. v. Montreal Bank, 17 Can. Sup. Ct. 692.

[40] Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89.

[41] Finch v. De Forest, 16 Conn. 445; Warder v. Gibbs, 92 Mich. 29, 52 N. W. 73; Gardner v. Wiley, 46 Ore. 96, 79 Pac. 341.

[42] Fourth Nat. Bank of Boston v. Mead, 216 Mass. 521, 104 N. E. 377, 52 L. R. A. (N. S.) 225n. See Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. 416.

[43] Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Drexler v. Smith, 30 Fed. 754; In re Many, Fed. Cas. No. 9054; Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070; Redlon v. Churchill, 73 Maine 146, 40 Am. Rep. 345; Hopkins v. Boyd, 11 Md. 107; Nichols v. Sober, 38 Mich. 678; First Nat. Bank v. Morgan, 73 N. Y. 593; Windham County Bank v. Kendall, 7 R. I. 77; Duncan v. Clark, 2 Rich. L. (S. Car.) 587; Sutton v. Gregory, Peake's Nisi Prius Cas. 150; Ridley v. Taylor, 13 East 175. See also Hibernian Bank v. Everman, 52 Miss. 500.

[44] Cotton v. Evans, 21 N. Car. 284.

[45] Roth v. Colvin, 32 Vt. 125.

to the fraud of the partner upon his firm, such fraud, it seems, will be available as a defense to an action against the firm.[46] In case of fraud by a partner in procuring the execution of a note to the firm, such fraud, it has been held, will be a defense to an action by the latter on the instrument.[47]

§ 432. What will put purchaser of partnership paper on inquiry.—Where in the discount or purchase of partnership paper the purchaser knows that a partner is applying the firm security to his individual use, thus apparently exceeding his authority, and committing a fraud on the other partners, he is put upon inquiry and must inquire as to such partner's authority before gaining the rights of a bona-fide holder.[48] This rule has been applied when the firm's indorsement was not made in the usual course of business;[49] where the selling partner was notoriously insolvent;[50] where a note of the maker payable to the firm was offered for sale by the maker after indorsement by the firm;[51] where a note in the firm name was indorsed by a member in payment of an individual debt;[52] where a member of one firm made a note payable to another firm of which he was a member, and then indorsed it for his individual debt;[53] where it is apparent the indorsement was by way of surety or accommodation, or the paper was put up as collateral;[54]

[46] Wells v. Masterman, 2 Esp. 731.

[47] Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108.

[48] Bloon v. Helm, 53 Miss. 21; Wagner v. Freschl, 56 N. H. 495; Union Nat. Bank v. Underhill, 21 Hun (N. Y.) 178; First Nat. Bank v. Weston, 25 App. Div. 414, 49 N. Y. S. 542; Dickson v. Primrose, 2 Miles (Pa.) 366.

[49] Stainer v. Tysen, 3 Hill (N. Y.) 279; Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143.

[50] Roth v. Colvin, 32 Vt. 125.

[51] Hendrie v. Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; Bank v. Rider, 58 N. H. 512; Brown v. Pettit, 178 Pa. St. 17, 35 Atl. 865, 34 L. R. A. 723, 56 Am. St. 742.

[52] New York Firemen's Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Cooper v. McClurkan, 23 Pa. St. 80; King v. Faber, 22 Pa. St. 21; Tanner v. Hall, 1 Pa. St. 417.

[53] Third Nat. Bank v. Marine Lumber Co., 44 Minn. 65, 46 N. W. 145; Creighton v. Halifax Bkg. Co., 18 Can. S. C. 140.

[54] United States Exch. Bank v. Zimmerman, 113 N. Y. S. 33; Cheever v. Pittsburg &c. R. C., 28 App. Div. 81, 50 N. Y. S. 1067; Smith

and where a note was signed in the surname of both partners, and the firm name was fictitious.[55] A bank receiving a check for deposit was put upon inquiry where it was payable to a partnership and indorsed by the firm by its manager and then personally indorsed by him and deposited to his individual account.[56] The mere fact that the name of a partnership is placed on a note below the signature of another obligor does not raise a presumption that it signed as surety.[57] But where notes were taken in the usual course of business,[58] or the note was merely made by the firm by one member to the order of that member,[59] or one member of the firm was president of a bank which indorsed a note after the firm indorsed it,[60] or a firm name was the second signature to a note where all signed as makers,[61] or where the maker of a note indorsed by his firm, also indorsed on it the name of another firm in which he was a partner,[62] it has been held there was nothing to put a purchaser on inquiry. It has been said that evidence of bad faith is necessary to put on inquiry.[63] And where circumstances were sufficient to put the purchaser on inquiry, but investigation would have disclosed the apparent authority of the disposing partner the firm has been held liable.[64] A note signed by a member of a partnership in the partnership name, but which is not delivered until after

v. Weston, 159 N. Y. 194, 54 N. E. 38; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466.

[55] Lucker v. Iba, 54 App. Div. 566, 66 N. Y. S. 1019.

[56] Buckley v. Lincoln Trust Co., 72 Misc. 218, 131 N. Y. S. 105.

[57] Union National Bank v. Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426n; Warren Deposit Bank v. Younglove, 112 Ky. 767, 66 S. W. 749, 23 Ky. L. 1969.

[58] Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. 283; Union Nut & Bolt Co. v. Doherty, 32 Misc. 247, 65 N. Y. S. 786 (affd. 32 Misc. 496, 66 N. Y. S. 405, 8 N. Y. Ann. Cas. 217); Swan v. Staele, 7 East 209, 8 R. R. 618.

[59] Potts v. Taylor, 140 Pa. St. 601, 21 Atl. 443.

[60] Kaiser v. First Nat. Bank, 78 Fed. 281, 124 C. C. A. 88.

[61] Union Nat. Bank v. Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426n.

[62] Moorehead v. Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

[63] Edwards v. Thomas, 66 Mo. 468.

[64] Buckley v. Lincoln Trust Co., 72 Misc. 218, 131 N. Y. S. 105; Citizens' Sav. Bank v. Blakesley, 42 Ohio St. 645.

the dissolution of the firm, can not be received as a partnership obligation.[65]

§ 433. Firm liability on notes of individual partner.— Where several or all of the partners sign a note individually and there is nothing to show it a firm obligation, they are liable as individuals even if the money was used for the firm,[66] but in some cases evidence has been permitted to show it a partnership obligation.[67] The firm is generally not liable on a promissory note made in the name of one partner if his name is not the firm name.[68] But where the holder of such a note can show that it was executed for the firm's benefit and taken as a firm obligation, the firm is usually held liable thereon.[69] A note given in part for the individual debt of the partner who executed it, and in whose name the firm does business, may be enforced against the firm as to firm debts included in it.[70] In Kentucky

[65] Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

[66] In re Robson, 218 Fed. 452; De Temple v. Rohrbach, 52 Pa. Super. Ct. 455. See also John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Gay v. Johnson, 45 N. H. 587; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293.

[67] Dreyfus v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Fosdick v. Van Horn, 40 Ohio St. 459; Crouch v. Bowman, 3 Humph. (Tenn.) 209.

[68] Patriotic Bank v. Coote, 3 Cranch (U. S.) 169, Fed. Cas. No. 10807; Buckner v. Lee, 8 Ga. 285; Hubbell v. Woolf, 15 Ind. 204; Mills v. Riggle, 83 Kans. 703, 112 Pac. 617, Ann. Cas. 1912 A, 616; Fair v. Citizens' State Bank, 9 Kans. App. 779, 59 Pac. 43; Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818; Blake v. St. Louis Third Nat. Bank, 219 Mo. 644, 118 S. W. 641; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 411; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621.

[69] Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630, Fed. Cas. No. 16872; Beebe v. Rogers, 3 G. Greene (Iowa) 319; Thomas v. Hardsocg, 137 Iowa 597; 115 N. W. 210; Seekell v. Fletcher, 53 Iowa 330, 5 N. W. 200; Mills v. Riggle, 83 Kans. 703, 112 Pac. 617, Ann. Cas. 1912 A, 616; Tucker v. Peaslee, 36 N. H. 167; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; National Bank v. Thomas, 47 N. Y. 15; Maffet v. Lenckel, 93 Pa. St. 468; Colwell v. Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913; Sessums v. Henry, 38 Tex. 37; Salt Lake City Brew. Co. v. Hawke, 24 Utah 199, 66 Pac. 1058; Williams v. Donaghe, 1 Rand. (Va.) 300. See Cadwell v. Shaw, 4 Mont. Q. B. 246. Compare Farmers' Bank v. Bayless, 35 Mo. 428.

[70] Gable v. Grimes, 2 Ind. 392; Le

the firm is liable on a note executed in the name of one partner if consent of all partners is shown, and the note was given for the firm benefit.[71] If given for a firm contract and indorsed by the firm all partners are bound.[72] An ordinary note signed in the individual name of a partner whose name is used as the firm name is held to be prima facie his individual note,[73] but the firm becomes liable on a showing that its business was transacted in the individual partner's name and that the signature was intended as a partnership signature.[74] "It seems to be well settled that where a partnership is carried on in the name of an individual and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners. And the plaintiff, in order to recover against the partners, must not only prove the execution of the note but go farther and prove either that the money for which the note was given was borrowed on the credit of the partnership, or that when obtained it was used in the business of the partnership. * * * If the individual whose name is used declares at the time of the transaction that it is an account of the partnership that is sufficient to bind the partners. And it would seem from an examination of the reported cases that the legal presumption that the debt is the debt of the individual in whose name the obligation is made, and not of the firm, may be repelled and overcome by proof as to the business in which such person was engaged."[75] And where no firm name has been adopted it has

Mars Nat. Bank v. Gehlen, 85 Iowa 716, 50 N. W. 944; Rice v. Doane, 164 Mass. 136, 41 N. E. 126.

[71] Nat. Exch. Bank v. Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. 763; Carter v. Mitchell, 94 Ky. 261, 22 S. W. 83, 15 Ky. L. 53.

[72] Reed v. Bacon, 175 Mass. 407, 56 N. E. 716.

[73] Germon v. Hoyt, 90 N. Y. 631; Burroughs' Appeal, 26 Pa. St. 264.

[74] United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Nicholson v. Patton, 2 Cranch. (U. S.) 164, Fed. Cas. No. 10250; Ontario Bank v. Hennessey, 48 N. Y. 545; Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402, 43 Am. Dec. 681. See also Mercantile Bank v. Cox, 38 Maine 500; Buckner v. Lee, 8 Ga. 285.

[75] Oliphant v. Mathews, 16 Barb. (N. Y.) 608.

been held that it may be shown that a note in one partner's name was executed for firm purposes and all parties understood that the firm was bound, and the firm thus made liable.[76]

§ 434. Notes as discharging debt.—Notes given by one member of a firm in his individual name do not discharge the partnership debt, unless there is an agreement to that effect.[77] But in Massachusetts, Maine and Vermont, it has been held that the acceptance of an individual note is prima facie payment of the partnership debt, the creditor having the burden of proving that it is not.[78] Taking the note of an ostensible partner does not discharge a dormant partner, it being said that the creditor can not be considered as intending to part with a security of which he did not know,[79] notes made by the firm, in the absence of such agreement, do not discharge the firm debt.[80] But where there is an agreement made in good faith without fraud or mistake to receive the note of a partner or even of a third party in satisfaction of a firm debt, it is generally held

[76] Dockery v. Faulkner (Tex. Civ. App.), 101 S. W. 501.

[77] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Dougal v. Cowles, 5 Day (Conn.) 511; Louderback v. Lilly, 75 Ga. 855; Lingenfelser v. Simon, 49 Ind. 82; Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341; Craswell v. Pure Bred Cattle Com. Co., 148 Iowa 9, 126 N. W. 908; Medberry v. Soper, 17 Kans. 369; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Claflin v. Ostrom, 54 N. Y. 581; Lee v. Larkin, 125 App. Div. 302, 109 N. Y. S. 480; Wilson v. Jennings, 15 N. Car. 90; McKee v. Hamilton, 33 Ohio St. 7; White v. Rech, 171 Pa. St. 82, 32 Atl. 1130; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Maffet v. Lenckel, 93 Pa. St. 468; Burdett v. Hayman (W. Va.), 60 S. E. 497, 15 L. R. A. (N. S.) 1019; Hoelflinger v. Wells, 47 Wis. 628, 3 N. W. 589.

[78] Paine v. Dwinel, 53 Maine 52, 87 Am. Dec. 533; Springer v. Shirley, 11 Maine 204; Chapman v. Durant, 10 Mass. 47; Stephens v. Thompson, 28 Vt. 77.

[79] Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Schemerhorn v. Loines, 7 Johns. (N. Y.) 311; Nichols v. Cheairs, 4 Sneed. (Tenn.) 229.

[80] Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75; Edwards v. Trulock, 37 Iowa 244; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Davis v. Allen, 3 N. Y. 168.

that it is a payment of the debt, and the creditor's remedy is in the note.[81] The intent to release copartners may be inferred where one takes a note from one partner for a firm debt and tells him that he accepts him for the debt.[82]

§ 435. Power to give note for individual debt.—A partner has no power to bind the other partners by giving notes in the firm name in payment of an individual debt or to secure an individual obligation,[83] and one who loans money on firm notes, knowing that the money was for the individual use of one partner, can not recover from the partnership,[84] unless the copartners have consented or given authority,[85] or they ratified the act,[86] or

[81] Lamkin v. Phillips, 9 Port. (Ala.) 98; Usher v. Waddingham, 62 Conn. 412, 26 Atl. 538; Bonnell v. Chamberlain, 26 Conn. 487; Hurd v. Blackman, 19 Conn. 177; Adams v. Reid, 56 Ga. 214; Stone v. Chamberlin, 20 Ga. 259; Maxwell v. Day, 45 Ind. 509; Drake v. Hill, 53 Iowa 37, 3 N. W. 811, 5 N. W. 745; Crooker v. Crooker, 52 Maine 267, 83 Am. Dec. 509; Swain v. Frazier, 35 N. J. Eq. 326; Waydell v. Luer, 3 Denio (N. Y.) 410; Thurber v. Corbin, 51 Barb. (N. Y.) 215; Hartford Fire Ins. Co. v. Dickenson, 73 Hun 579, 26 N. Y. S. 175, 57 N. Y. St. 261; Fowler v. Richardson, 3 Sneed. (Tenn.) 508; Ricker v. Adams, 59 Vt. 154, 8 Atl. 278; Robinson v. Hurlburt, 34 Vt. 115; Dages v. Lee, 20 W. Va. 584; Port Darlington Harbour Co. v. Squair, 18 U. C. Q. B. 533. See Arnold v. Camp, 12 Johns. (N. Y.) 409, 7 Am. Dec. 328.

[82] Grubbe v. Pierce, 156 Wis. 29, 145 N. W. 207, 51 L. R. A. (N. S.) 358n, Ann. Cas. 1915 C, 1199.

[83] First Nat. Bank of Miles City v. State Nat. Bank of Miles City, 131 Fed. 422; Mauldin v. Mobile Br. Bank, 2 Ala. 502; Terry v. Platt, 1 Pennew. (Del.) 185, 40 Atl. 243; McRae v. Campbell, 101 Ga. 662, 28 S. E. 920; Hickman v. Reineking, 6 Blackf. (Ind.) 387; Breckenridge v. Shrieve, 4 Dana (Ky.) 375; Mutual Nat. Bank v. Richardson, 33 L. Ann. 1312; Daniels v. Hammond, 154 Mass. 165, 28 N. E. 12; Roberts v. Pepple, 55 Mich. 367, 21 N. W. 319; Robinson v. Aldridge, 34 Miss. 352; Hickman v. Kunkle, 27 Mo. 401; Williams v. Gilchrist, 11 N. H. 535; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Brown v. Haynes, 59 N. Car. 49; King v. Faber, 22 Pa. St. 21; Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; Poindexter v. Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; Arden v. Sharpe, 2 Esp. 524, 5 R. R. 748.

[84] Phipps v. Little, 213 Mass. 414, 100 N. E. 615.

[85] Randall v. Hunter, 76 Cal. 255, 18 Pac. 317, 66 Cal. 512, 6 Pac. 331; Wile v. Denison Clothing Co., 138 Iowa 109, 138 N. W. 1098; Midland Nat. Bank v. Schoen, 123 Mo. 650, 27 S. W. 547; Levi v. Latham, 15 Nebr. 509, 19 N. W. 460, 48 Am. Rep. 361; Pitfield v. Trotter, 32 Nova Scotia 125.

[86] Tompkins v. Woodyard, 5 W. Va. 216.

consented to the use of the money for partnership purposes,[87] or have held him out as having such authority, estopping themselves,[88] or the paper is in the hands of a bona-fide purchaser.[89] Especially are the other partners not liable where the negotiable instrument was given for a debt contracted before the formation of the partnership[90] or after its dissolution or termination,[91] unless there is a showing of authority from the partners other than the one making the note.[92]

§ 436. Power to make sealed note.—As a partner generally has no power to bind the firm by the execution of a sealed instrument, so where one partner gives a sealed note in the firm name as a general rule he only is bound,[93] and it has been held that they are not bound, even if the note would have been valid without seal,[94] other courts, however, hold it may be disregarded as surplusage,[95] or they may be liable upon the original consideration,[96] or because of ratification.[97] But under the Georgia code, authority by an instrument under seal is not necessary before a partner can bind a partnership by signing its name to

[87] Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Robinson v. Aldridge, 34 Miss. 352; Whitaker v. Brown, 11 Wend. (N. Y.) 75.

[88] Carver v. Dows, 40 Ill. 374; Boardman v. Gore, 15 Mass. 331; Hayner v. Crow, 79 Mo. 293.

[89] Driggs v. Driggs, 46 Hun 676, 11 N. Y. St. 256.

[90] Landauer v. Littman, 135 N. Y. S. 8.

[91] Shaw v. Gunby (Mo. App.), 176 S. W. 548.

[92] Harris v. Heilig, 84 N. J. L. 40, 85 Atl. 1023.

[93] Morris v. Jones, 4 Harr. (Del.) 428; Brozee v. Poyntz, 3 B. Mon. (Ky.) 178; Heath v. Gregory, 46 N. Car. 417; Hoskinson v. Eliot, 62 Pa. St. 393; Millwee v. Jay, 47 S. Car. 430, 25 S. E. 298.

[94] Hull v. Young, 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677. See Boyd v. Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. 685.

[95] Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75; Purviance v. Sutherland, 2 Ohio St. 478; Cowan v. Cunningham, 146 N. Car. 453, 59 S. E. 992.

[96] Daniel v. Toney, 2 Metc. (Ky.) 523.

[97] Henderson v. Barbee, 6 Blackf. (Ind.) 26.

a note under seal,[98] and he may even delegate this authority to an agent.[99]

§ 437. Form of signature—Alteration or renewal of note. —If a note is signed in a name not materially different from the firm name, it is usually held to bind the firm.[1] The holder usually may recover on paper not executed in the firm name, if he can show that the firm was intended to be bound thereby.[2] If a partner has power to make a note binding on the firm, he has power to alter its terms,[3] as by changing the place,[4] or time of payment,[5] or date when interest begins.[6] If there is no implied power in one partner to issue such paper, all partners must assent to or authorize its alteration in order to bind the firm.[7] A partner who has implied authority to make negotiable paper has the same authority to renew it.[8]

[98] Swygert v. Bank of Haralson, 13 Ga. App. 640, 79 S. E. 759.

[99] Merchants' &c. Bank v. Johnston, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969n, 14 Ann. Cas. 546.

[1] Caldwell v. Sithens, 5 Blackf. (Ind.) 99; Sherman v. Christy, 17 Iowa 322; Peck v. Tingley, 53 Nebr. 171, 73 N. W. 450; Mohawk Nat. Bank v. Van Slyck, 29 Hun (N. Y.) 188; Ganson v. Lathrop, 25 Barb. (N. Y.) 455; Staats v. Howlett, 4 Denio (N. Y.) 559; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Doty v. Bates, 11 Johns. (N. Y.) 544; Horton v. Child, 15 N. Car. 460; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; In re Barnard, 55 L. J. Ch. 935, 32 Ch. Div. 447, 55 L. T. 40, 34 W. R. 782.

[2] Melsheimer v. Hommel, 15 Colo. 475, 24 Pac. 1079; Bacon v. Hutchings, 5 Bush (Ky.) 595; Holden v. Bloxum, 35 Miss. 381; Farmers' Bank v. Bayless, 41 Mo. 274; Maynard v. Fellows, 43 N. H. 255.

[3] Taylor v. Taylor, 12 Lea (Tenn.) 714.

[4] Pahlman v. Taylor, 75 Ill. 629.

[5] Uhlendorf v. Kaufman, 41 Ill. App. 373.

[6] Mace v. Heath, 30 Nebr. 620, 46 N. W. 918.

[7] Horn v. Newton City Bank, 32 Kans. 518, 4 Pac. 1022; Greenslade v. Dower, 1 M. & Ry. 640, 7 B. & C. 635, 6 L. J. (O. S.) K. B. 155, 31 R. R. 272.

[8] Hayden Milling Co. v. Lewis, 3 Ariz. 277, 32 Pac. 263; Hurd v. Haggerty, 24 Ill. 171; Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070; National Exch. Bank v. Wilgus, 95 Ky. 309, 25 S. W. 2, 15 Ky. L. 763; Midland Nat. Bank v. Schoen, 123 Mo. 650, 27 S. W. 547; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471; McKee v. Hamilton, 33 Ohio St. 7; Saylor v. Merchants Exch. Bank, 1 Walk. (Pa.) 328; Union Bank v. Eaton, 5 Humph. (Tenn.) 499. But see Lime Rock F. & M. Ins. Co. v. Treat, 58 Maine 415.

§ 438. **Powers after dissolution.**—The powers of a partner after dissolution with regard to binding other members as to commercial paper will be considered in the chapter on dissolution.

§ 439. **Power as to presentment and protest.**—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, it was held that presentment for payment may be made to any of them, even though there has been a dissolution of the firm.[9] Protest of a bill drawn and indorsed by a copartnership may be waived, it has been held, by one of its members even though he is cashier of the bank which has discounted such bill;[10] although a liquidating partner after dissolution of the firm, has no power to waive protest of a draft then given to pay a partnership debt and thus bind a former dormant partner.[11] "Where the parties to be notified (on a negotiable instrument) are partners, notice to any one partner is notice to the firm, even though there has been a dissolution."[12]

§ 440. **Power to mortgage firm property.**—If, as has been seen, a partner in certain classes of partnerships has the right to incur obligations and to give evidences of the obligations, signing the firm name thereto, the question naturally presents itself as to the partner's power to give collateral to the obligation, or, going a step farther, to sell firm property to raise the money directly. In a case in which the whole question as to sale and mortgage of real or personal property is very fully and satisfactorily discussed,[13] it was said: "It is within the scope of

[9] See § 469 on notice. See also Negotiable Instrument Law, § 137; Brown v. Turner, 15 Ala. 832; Mt. Pleasant Branch of State Bank v. McLeran, 26 Iowa 306; Fourth Nat. Bank v. Heuschen, 52 Mo. 207.

[10] Hays v. Citizens' Sav. Bank, 101 Ky. 201, 19 Ky. L. 367, 40 S. W. 573.

[11] Mauney v. Coit, 80 N. Car. 300, 30 Am. Rep. 80.

[12] Negotiable Instrument Law, § 170. See also Brown v. Turner, 15 Ala. 832; Fourth Nat. Bank v. Althemier, 91 Mo. 190, 3 S. W. 858; Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Riddle v. McBeth, 2 Ohio Dec. 606.

[13] Tapley v. Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374 (1840).

partnership authority for one partner to sell and dispose of all the partnership goods, in the orderly and regular course of business. It is also within the scope of partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He (a partner), being authorized to sell the goods to raise money to pay their debts, may apply the goods directly to the payment of the debts; and according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation. If it were in the form of a consignment to a commission merchant or an auctioneer, and an advance of money obtained for the use of the firm, we think there could be no question but that it would be within the scope of the partnership authority. And now that the law has given encouragement to mortgages of personal property, which is only another mode of pledging goods, and has substituted an instrument in writing capable of being recorded in the town clerk's book, and has given to such record an effect equivalent to the actual delivery of the goods,[14] we can not perceive why it may not be resorted to by partners as well as individual persons. To what extent one partner can bind another in the disposition of the entire property of the concern is a question of power arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised. Lands held by partners are considered as lands held by tenants in common; and as one tenant in common can not pass any estate of his cotenant, and as land can not pass without deed, it follows that one partner can not convey away the real estate of the firm without special authority. But considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done without deed, the courts are of opinion that such a mortgage, made by one partner in the ab-

[14] Bullock v. Williams, 16 Pick. (Mass.) 33.

sence of the other, * * * was binding upon the property, and constituted a valid lien upon the property." This case clearly shows the authority of a partner to mortgage or sell property within the apparent scope of the partnership business, unless precluded by other technical rules, such as are incorporated in real estate law. The law seems, as a general thing, to accord to each individual partner in a mercantile concern the power to bind his associates by a mortgage of the partnership chattels, executed in the firm name to secure a partnership debt,[15] provided such mortgage will not have the effect of terminating the common business.[16] A mortgage in fraud of copartners

[15] Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013; Settle v. Hargadine-McKittrick Dry Goods Co., 66 Fed. 850, 14 C. C. A. 144; O'Neal v. Judsonia State Bank, 111 Ark. 589, 164 S. W. 295; Jacks v. Greenhaw, 105 Ark. 615, 152 S. W. 160; Gates v. Bennett, 33 Ark. 475; Breen v. Richardson, 6 Colo. 605; Phillips v. Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; Denton Bros. v. Hannah, 12 Ga. App. 494, 77 S. E. 672; McCarthy v. Seisler, 130 Ind. 63, 29 N. E. 407; Tapley v. Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374; Beckman v. Noble, 115 Mich. 523, 73 N. W. 803; Robards v. Waterman, 96 Mich. 233, 55 N. W. 662; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242; Keck v. Fisher, 58 Mo. 532; Holt v. Simmons, 16 Mo. App. 97; Horton v. Bloedorn, 37 Nebr. 666, 56 N. W. 321; Cohen v. Miller, 46 Misc. 106, 91 N. Y. S. 345; Stone Co. v. McLamb, 153 N. Car. 378, 69 S. E. 281; Hembree v. Blackburn, 16 Ore. 153, 19 Pac. 73; Morris v. Hubbard, 14 S. Dak. 525, 86 N. W. 25; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210; Rock v. Collins, 99 Wis. 630, 75 N. W. 426; Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422; Ex parte Bosanquet, 1 De Gex 432; Mason v. Parker, 16 Grant Ch. (U. C.) 230. Likewise, a mortgage in the several names of the individual partners, Patch v. Wheatland, 8 Allen (Mass.) 102. So also with his copartner's consent, a mortgage in his own name, Clay v. Greenwood, 35 Nebr. 736, 53 N. W. 659.

[16] Osborne v. Barge, 29 Fed. 725; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338. Contra: Letts-Fletcher Co. v. McMaster, 83 Iowa 449, 49 N. W. 1035. But see Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013, in which it is said: "It was also well settled by the decisions of that court [the Supreme Court of Missouri], that each partner, by virtue of the relation of partnership, and of the community right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose, within the scope of the partnership business, and might therefore, without the concurrence of his

may be set aside.[17] And if one partner actively dissents, it is held that the other can not mortgage the firm property even for the firm benefit.[18] Where a partner mortgages his share in the firm, it is subject to all the copartners' equities.[19] It has even been held in a case decided not so very many years ago that, since partnership realty is personalty to the extent necessary for the satisfaction of the firm obligations, one partner may, to secure such an obligation, give a mortgage in the firm name upon land which forms a part of the firm assets, even though there has been no actual knowledge of, express consent to, or ratification of, his act on the part of his associate.[20] Such an unqualified position, however, does not seem to be able to rally the weight of authority to its support. The view more generally adhered to is that a real estate mortgage made by a single partner must, in order to bind the firm, be executed at the instance, with the express consent, with the knowledge, or in the presence of, his associate or associates, as the case may be, or the latter must have subsequently ratified the act of the copartner in giving the same.[21] And yet an exception to the general rule, that an

copartners, mortgage the partnership property by deed of trust, to secure the payment of a partnership debt * * * although one partner, without the concurrence of his copartners, could not delegate to a stranger the right of the partnership to administer the partnership effects, and therefore could not make a general assignment of all the property of the partnership for distribution by the assignee among the partnership creditors, retaining no equity of redemption in the partnership." See also Whitton v. Smith, Freem. Ch. (Miss.) 231; Weir Plow Co. v. Evans (Tex. Civ. App.), 24 S. W. 38.

[17] Kirby v. McDonald, 70 Fed. 139, 17 C. C. A. 26.

[18] H. Y. McCord Co. v. Collaway, 109 Ga. 796, 35 S. E. 171.

[19] Kelly v. Hutton, L. R. 3 Ch. 703.

[20] Long v. Slade, 121 Ala. 267, 26 So. 31. See also Neer v. Oakley, 18 N. Y. St. 374, 2 N. Y. S. 482.

[21] McGahan v. National Bank of Rondout, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347. See Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966; Cottle v. Harrold, 72 Ga. 830; Ely v. Hair, 16 B. Mon. (Ky.) 230; Baker v. Lee, 49 La. Ann. 874, 21 So. 388; Seawell v. Payne, 5 La. Ann. 255; Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. 773; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. S. 753; Tarbel v. Bradley, 7 Abb. N. Cas. 273 (affd. 86 N. Y. 280); Williams v. Gillies, 13 Hun (N. Y.) 422; Napier v. Catron, 2 Humph. (Tenn.) 534; Schwab Clothing Co. v. Claunch (Tex.), 29 S. W. 922; Caviness v. Black (Tex. Civ. App.), 33 S. W. 712; Byrd v. Perry, 7 Tex.

authority to bind another by an instrument under seal must itself be created by a like instrument, seems, in some instances, to have been established in the case of partners.[22] If authority to execute a sealed contract having to do with personalty may be implied from this relation, no good reason can be assigned why the authority to execute a sealed conveyance of land should not likewise be implied. Thus Lord Kenyon has said that if the partnership relation gives this authority in the one case, it "would extend to the case of mortgages."[23] "A conveyance of partnership property by one partner, with the consent of the other, for the purpose of paying partnership debts, binds such other partner, and his death does not operate to defeat the power of sale conferred by the instrument."[24] And it has been said that one partner may give an equitable mortgage of partnership real estate.[25] But it has been held that where the members of a planting partnership acquire immovable property, they become joint owners of the same, and a mortgage by one of the partners in the firm name binds only his portion of the property.[26]

And yet where a partnership has at its own expense for its own purposes erected buildings and machinery on land belonging to one of the partners individually, without expressly agreeing as to the ownership of such fixtures, it has been held that the holder of the legal title to the land by mortgaging the latter, together with the buildings, etc., to secure a loan obtained by him

Civ. App. 378, 26 S. W. 749; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795. Consult Cottle v. Harrold, 72 Ga. 830; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Weeks v. Mascoma Rake Co., 58 N. H. 101; Jones v. Davis (N. J.), 25 Atl. 370; McNeal Pipe & Foundry Co. v. Woltman, 114 N. Car. 178, 19 S. E. 109; Baldwin v. Richardson, 33 Tex. 16. Compare Horton v. Bloedorn, 37 Nebr. 666, 56 N. W. 321; In re Blanchard, 161 Fed. 793.

[22] See Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Met. (Mass.) 548; Smith v. Kerr, 3 N. Y. 144.

[23] Harrison v. Jackson, 7 Term Rep. 203.

[24] Barnett v. Houston, 18 Tex. Civ. App. 134, 4. S. W. 689.

[25] Ex parte Broadbent, 4 Deac. & C. 3; Lindley Partnership (7th ed.), p. 166.

[26] Baker v. Lee, 49 La. Ann. 874, 21 So. 588. See also Kahn v. Becnel, 108 La. 296, 32 So. 444.

for the purpose of discharging the partnership debts, binds his copartner's interest in the fixtures.[27] Moreover, where a mortgage of chattels is signed by one of the partners without authority and without the knowledge or consent of his associate or the mortgagee, and is delivered to another for the purpose of delivery to the mortgagee, and the latter, when he learns of the mortgage, takes time to decide whether he will accept and does not actually accept until a time subsequent to a dissolution of the firm and notice thereof, such mortgage is not binding upon the member of the firm who did not join in the same.[28]

Again "one member of a nontrading partnership has no power to sell or mortgage all the assets of the concern without the consent of his copartner, unless the power is given otherwise than by implication from the ordinary nature of the business."[29] The attempted transfer by one partner of his interest in partnership property can not prejudice the rights of a partnership mortgagee.[30]

§ 441. Mortgage to secure partner's individual debt.— Since one member of a firm can not, without the consent of his copartner, use partnership property in discharging his individual obligations, he does not abridge the rights of his associate by giving to his personal creditor a mortgage thereon executed in the firm name.[31] But if one partner mortgages his apparent interest in land, conveyed to the members of the firm as tenants in common, for a consideration paid him at the time, as, for instance, for a loan of money, the mortgagee having no

[27] Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. 773.

[28] Meyer v. Michaels, 69 Nebr. 138, 95 N. W. 63, 97 N. W. 817.

[29] Huey v. Fish, 15 Tex. Civ. App. 455, 40 S. W. 29. See also McManus v. Smith, 37 Ore. 222, 61 Pac. 844.

[30] National Citizens' Bank of Mankato v. McKinley (Minn.), 152 N. W. 879.

[31] Gossett v. Morrow, 4 Ala. App. 306, 58 So. 799; H. Y. McCord Co. v. Callaway, 109 Ga. 796, 35 S. E. 171; Rainey v. Nance, 54 Ill. 29; Smith v. Andrews, 49 Ill. 28; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273. See also Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899. And compare Walker v. White, 60 Mich. 427, 27 N. W. 554.

notice of the character of the property in equity as copartnership property, it seems that he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. A person taking a mortgage without notice that it covers partnership property is a purchaser, and is subject to no equity in favor of the partnership or of its creditors.[32] If the property has been purchased by the individual partners with their own funds, each taking a conveyance of an undivided interest, the fact that the property has for a time been used for the partnership business is not generally sufficient to impress it with an equitable lien for the payment of partnership debts as against a mortgage of one partner's interest to secure his individual debt.[33] A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts. The mortgage is not available until the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority;[34] or if creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.[35] There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.[36] Upon the bankruptcy of the firm, the assignee, in behalf of the creditors, would be entitled to the property in preference. If one partner, upon retiring

[32] Hewitt v. Rankin, 41 Iowa 35; Hiscock v. Phelps, 49 N. Y. 97; Seeley v. Mitchell, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190.

[33] Wilhite's Admr. v. Boulware, 88 Ky. 169, 11 Ky. L. 59, 10 S. W. 629.

[34] Beecher v. Stevens, 43 Conn. 587; Seeley v. Mitchell, 85 Ky. 508, 4 S. W. 190, 9 Ky. L. 86; Rockefellar v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788. See also Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161. 48 Am. St. 56.

[35] Fargo v. Ames, 45 Iowa 491; Seaman v. Huffaker, 21 Kans. 254; Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458.

[36] Lovejoy v. Bowers, 11 N. H. 404.

from the partnership, conveys his interest in the partnership real estate to another person, who then comes in and forms a new firm, and this new partner executes a mortgage of such real estate to secure the purchase-money, in the absence of any evidence that the mortgage was intended to be a mortgage of this partner's interest in the new firm, it is proper to regard it as a mortgage of the same partnership interest in the old firm which was conveyed to the new partner, and not of his interest in the new firm. Such a mortgage is subject to the payment of the debts of the old firm, but not to the payment of the debts of the new firm.[37]

§ 442. Bona-fide holders of mortgage on partnership real estate.—It has been held that the mortgagee must be in the position of a bona-fide purchaser for value; he must have parted with money or goods, or something of value, in reliance upon the security that if he has simply taken the mortgage to secure an existing debt, or has knowledge of the facts which make the property in equity assets of the firm, then his mortgage will be postponed to the equities of those who have a right to have the property applied as assets of the copartnership.[38] But a recital in a deed to three persons that the conveyance was in the proportion of an undivided half to one of them, and an undivided fourth to each of the others, "this being the proportional undivided interest of each of the above partners in the lumber firm and land" of the partnership, was held not necessarily to impart notice to a mortgagee of the interest of one of the grantees of the equitable rights of the others as representing the creditors of the firm.[39] If the description of the property in the mortgage itself shows that the property is that of the partnership, as where it is described as all the right, title and interest of a partner individually, and as a member of a certain firm in all the real estate and other property of the firm, the mortgagee necessarily has no-

[37] Beecher v. Stevens, 43 Conn. 587. See Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378.

[38] Hiscock v. Phelps, 49 N. Y. 97.

[39] Van Slyck v. Skinner, 41 Mich. 186, 1 N. W. 971. But the decision in this case does not seem to be quite in harmony with other authorities.

tice of the partnership equities. The existence of such a mortgage can not prevent the copartners from disposing of the real estate for the legitimate purposes of the firm, such as adjusting its affairs with creditors, or with each other. The recording of such mortgage is without effect upon the other members of the copartnership, or upon any one taking a conveyance made for partnership purposes.[40] Where a copartnership carried on business in a store built by the firm upon land, the legal title to which was in A, and one of his copartners, to secure a copartnership debt, executed a mortgage of the land with the consent of his copartners, and in the name of A & Co., and acknowledged the execution of it as "his free act and deed, * * * on behalf of said firm," it was held valid as against a person who, with actual notice of this, took a subsequent mortgage of the same property executed by A.[41] Such a mortgage is likewise valid as against a creditor of the firm whose lien is of subsequent origin.[42] If a partner mortgage his separate property to secure a firm debt, it has been held that he becomes a surety for the firm and that his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.[43]

§ 443. **Power to pledge firm property.**—The authority to sell firm property or to borrow money for the firm carries with it implied authority to pledge or assign firm property to secure firm debts.[44] One partner may assign a mortgage to a firm as se-

[40] Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273 (affd. 86 N. Y. 280). See note in this case for decisions relating to partnership realty.

[41] Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[42] Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551.

[43] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[44] George v. Tate, 102 U. S. 564, 26 L. ed. 232; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565; Hopkins v. Thomas, 61 Mich. 389, 28 N. W. 147; Clark v. Rives, 33 Mo. 579; Holt v. Simmons, 16 Mo. App. 97; McClelland v. Remsen, 42 N. Y. (3 Keyes) 454, 3 Abb. Dec. 74, 5 Abb. Pr. (N. S.) 250; Keller v. Smith, 20 Tex. Civ. App. 314, 49 S. W. 263; Marshall v. MaClure, L. R. 10 App. Cas. 325; Reid v. Hollinshead, 4 B. & C. 867. See In re Hill, 186 Fed. 569.

curity for firm debts.[45] There is no implied authority to pledge firm property as security for individual debts,[46] but the conduct of his copartners may make them liable by estoppel.[47] The assignment or pledge by one partner of firm property to secure his individual debt, will, though not binding the firm, create a charge on his interest in the pledged property.[48]

§ 444. Power to sell firm property.—The power to sell firm property which is held for the purpose of sale in the course of business, is implied in a partner in a commercial business, and a sale by one partner is a sale by the firm.[49] One partner who has power to sell firm goods as merchandise, may agree to exchange them for other goods suitable for the firm use within the scope of its business and thus bind his copartners.[50] A partner in a nontrading partnership may transfer property of the firm to pay its debts.[51] But in a nontrading partnership,

[45] Morrison v. Mendenhall, 18 Minn. 232 (Gil. 212); Galway v. Fullerton, 17 N. J. Eq. 389; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

[46] Blair v. Harrison, 57 Fed. 257, 6 C. C. A. 326; Claflin v. Bennett, 51 Fed. 693; Smith v. Andrews, 49 Ill. 28; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Brooks-Waterfield Co. v. Carpenter, 53 S. W. 40, 21 Ky. L. 851; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Stockdale v. Ullery, 37 Pa. St. 486, 78 Am. Dec. 440; Wilkinson v. Eykyn, 14 L. T. Rep. (N. S.) 158; Smith v. Burrage, 4 Taunt. 684.

[47] Day v. Perkins, 2 Sandf. Ch. (N. Y.) 359; Buchanan v. People's Bank (Tenn.), 57 S. W. 207; Liberty Sav. Bank v. Campbell, 75 Va. 534; Ex parte Darlington Joint-Stock Banking Co., 4 DeG., J. & S. 581.

[48] Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Rainey v. Nance, 54 Ill. 29; Patterson v. Atkinson, 20 R. I. 102, 37 Atl. 532.

[49] Anderson v. Tompkins, 1 Brock. 456, Fed. Cas. No. 365; Planters' Trading Co. v. Moore, 7 Ala. App. 393, 62 So. 302; Bass Dry Goods Co. v. Granite Mfg. Co., 113 Ga. 1142, 39 S. E. 471; Hardy v. Jones, 13 Ga. App. 457, 79 S. E. 246; Hermann v. Louisiana State Ins. Co., 8 La. 285; Lamb v. Durant, 12 Mass. 54, 7 Am. Dec. 31; Quiner v. Marblehead Social Ins. Co., 10 Mass. 476; Boswell v. Green, 25 N. J. L. 390; Comstock v. Buchanan, 57 Barb. (N. Y.) 127 (affd. 57 Barb. 146n.); Gross v. Gross, 128 App. Div. 429, 112 N. Y. S. 790; Christ v. Firestone, 7 Pa. Cas. 376, 11 Atl. 395; Lambert's Case, Godb. 244.

[50] White v. Toles, 7 Ala. 569; Lemon v. Fox, 21 Kans. 152; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Liberty Sav. Bank v. Campbell, 75 Va. 534.

[51] Ullman v. Myrick, 93 Ala. 532, 8 So. 410; Denton v. Hannah, 12 Ga. App. 494, 77 S. E. 672; Schneider v. Schmidt, 82 N. J. Eq. 81, 88 Atl.

while one partner, it seems, should have the power to dispose of any property held for sale, he has no power to sell property not so held, unless the other partners consent.[52] A partner in farming has no authority to sell the farming implements and live stock.[53] It is held that a member of a bakery firm can bind the other by his contract disposing of part of their route and good will.[54] A partner has no right to give away firm property,[55] nor can he convey title in fraud of the other partners.[56] Each partner has implied authority to deal with, sell and transfer choses in action belonging to the firm and an assignment of a chose in action by a partner in the firm name will give valid title to the assignee.[57] Among choses in action capable of such transfer are, it is held, a debt with a power of attorney to collect,[57a] a judgment,[58] an insurance policy,[59] claims held by a law firm for collection,[60] or under the Montana code a contract right to purchase land.[61] As a general rule a partner does not have the power to sell partnership real estate and pass a legal title,[62] and such conveyance will pass but his own interest.[63] And

179; Mabbett v. White, 12 N. Y. 442; Phœnix Ins. Co. v. Fleenor, 104 Ark. 119, 148 S. W. 650; Henderson v. Nicholas, 67 Cal. 152, 7 Pac. 412; Moynahan v. Prentiss, 10 Colo. App. 295, 51 Pac. 94; Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Phillips v. Thorp, 12 Okla. 617, 73 Pac. 268.

[53] Rutherford v. McDonnell, 66 Ark. 448, 51 S. W. 1060.

[54] Gewirtz v. Abraham, 171 Ill. App. 433.

[55] Daniel v. Daniel, 9 B. Mon. (Ky.) 195; Lobdell v. Slawson, 90 Mich. 201, 51 N. W. 349.

[56] Gill v. Crosby, 63 Ill. 190.

[57] Little v. Britton (Ala.), 66 So. 694; Whitehurst v. Brice, 14 Ga. App. 209, 80 S. E. 670; Quiner v. Marblehead Social Ins. Co., 10 Mass. 476; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Sullivan v. Visconti, 69 N. J. L. 452, 55 Atl. 1133; Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. 611, 30 L. R. A. 61; Radt v. Rosenfeld, 20 Misc. 312, 45 N. Y. S. 847; Clarke v. Hogeman, 13 W. Va. 718.

[57a] Mills v. Barber, 4 Day (Conn.) 428.

[58] Randolph Bank v. Armstrong, 11 Iowa 515.

[59] Hermann v. Louisiana State Ins. Co., 8 La. 285.

[60] Pierce v. Jarnagin, 57 Miss. 107.

[61] Milwaukee Land Co. v. Ruesink (Mont.), 148 Pac. 396.

[62] Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. ed. 622; Calder v. Creditors, 47 La. Ann. 346, 16 So. 852; Arnold v. Stevenson, 2 Nev. 234; McWhorter v. McMahon, Clarke Ch. (N. Y.) 400.

[63] Elliott v. Dycke, 78 Ala. 150; Brewer v. Browne, 68 Ala. 210; God-

where the conveyance was made in the presence of the copartners, or with their assent, or has been ratified by them, all the partners are bound.[64] As has been seen, a partner has no implied power to execute a sealed conveyance of real estate, and it is upon this ground that many of the cases deny his right to convey real property.[65] But it has been said that one partner may make a binding contract to convey partnership real estate, though not a binding conveyance.[66] Generally a mortgage to a partnership should be assigned by a deed executed by all the partners; for although it belongs to the partnership, the legal estate is in the individual members of it, as tenants in common, and it is held that one partner can not make a legal assignment by executing an assignment in the name of the firm,[67] but he can make an equitable assignment by a transfer of the debt.[68] A partner may make a valid conveyance and give legal title to firm real estate which stands in his name, conveying free from equities of his copartners as to a good-faith purchaser.[69] And if the business of the partnership is to deal in real estate which is held as partnership stock for sale, it seems the power in one

dard v. Renner, 57 Ind. 532; Willey v. Carter, 4 La. Ann. 56; Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Ann. Cas. 1913 A, 1081n; Walton v. Tusten, 49 Miss. 569; Garner's Appeal, 1 Walk. (Pa.) 438; Jones v. Neale, 2 Pat. & H. (Va.) 339; Crane v. Rapple, 22 Ont. 519.

[64] Ferguson v. Hanauer, 56 Ark. 179, 19 S. W. 749; Lee v. Onstott, 1 Ark. 206; Little v. Hazzard, 5 Har. (Del.) 291; Haynes v. Seachrest, 13 Iowa 455; Weld v. Peters, 1 La. Ann. 432; Shirley v. Fearne, 33 Miss. 653, 69 Am. Dec. 375; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. 761; Baldwin v. Richardson, 33 Tex. 16.

[65] See ante § 422. Arnold v. Stevenson, 2 Nev. 234; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

[66] Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690.

[67] Dillon v. Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700.

[68] In re Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

[69] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Clark v. Allen, 34 Iowa 190; Rivarde v. Roussean, 7 La. Ann. 3; Bond Realty Co. v. Pounds, 128 App. Div. 91, 112 N. Y. S. 433; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510. See also Clark v. Allen, 34 Iowa 190; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. 773; Tarbell v. West, 86 N. Y. 280.

partner to make a valid contract of sale should be implied,[70] or where the land is considered as converted into personalty for all purposes.[71] If it comes about in the course of trade as an incident to the firm's regular business a partner, as a general rule, has the implied power to dispose of the firm's entire personal property, and his copartners are bound by such a sale in good faith.[72] But a transfer of all the partnership goods by one partner not made in the course of trade, for a purpose not within the scope of the partnership, and not in payment of or security for a firm debt, is not valid,[73] especially if there is no necessity for such transfer,[74] or the effect is practically to terminate the business and break up the firm.[75] If the copartner

[70] Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736; Rovelsky v. Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. 83; Batty v. Adams, 16 Nebr. 44, 20 N. W. 15; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Sage v. Sherman, 2 N. Y. 417; Ludlow v. Cooper, 4 Ohio St. 1; Moderwell v. Mullison, 21 Pa. St. 257; Robinson v. Crowder, 4 McCord (S. Car.) 519, 17 Am. Dec. 762.

[71] Young v. Wheeler, 34 Fed. 98; Davis v. Smith, 82 Ala. 198, 2 So. 897; Paton v. Baker, 62 Iowa 704, 15 N. W. 586.

[72] Anderson v. Tompkins, 1 Brock. (U. S.) 456, Fed. Cas. No. 365; Ellis v. Allen, 80 Ala. 515, 2 So. 676; Williams v. Barnett, 10 Kans. 455; Coakley v. Weil, 47 Md. 277; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Whitton v. Smith, Freem. Ch. (Miss.) 231; Graser v. Stellwagen, 25 N. Y. 315; Phillips v. Thorp, 12 Okla. 617, 73 Pac. 268; Deckard v. Case, 5 Watts (Pa.) 22, 30 Am. Dec. 287; Williams v. Roberts, 6 Coldw. (Tenn.) 493; Schneider v. Sansom, 62 Tex. 201, 50 Am. Rep. 521; Forkner v. Stuart, 6 Grat. (Va.) 197; Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147; Fox v. Hanbury, Cowp. 445; Paterson v. Maughan, 39 U. C. Q. B. 391. But compare Bender v. Hemstreet, 12 Misc. 620, 34 N. Y. S. 423, 68 N. Y. St. 254; and Halstead v. Shephard, 23 Ala. 558. Also see as to effect of statutes on such sales, Carrie v. Cloverdale Banking &c. Co., 90 Cal. 84, 27 Pac. 58; Myers v. Moulton, 71 Cal. 498, 12 Pac. 505; Crites v. Wilkinson, 65 Cal. 559, 4 Pac. 567; Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625.

[73] Wilcox v. Jackson, 7 Colo. 521, 4 Pac. 966; Cayton v. Hardy, 27 Mo. 536; Freeman v. Abramson, 30 Misc. 101, 61 N. Y. S. 839.

[74] Drake v. Thyng, 37 Ark. 228; Horton v. Bloedorn, 37 Nebr. 666, 56 N. W. 321.

[75] Osborne v. Barge, 29 Fed. 725; Kimball v. Hamilton Fire Ins. Co., 8 Bosw. (N. Y.) 495; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; McNair v. Wilcox, 121 Pa. St. 437, 15 Atl. 575, 6 Am. St. 799.

is accessible or within easy communication by mail or wire, it is the partner's duty to consult him prior to a sale of all the firm property,[76] and where the sale is made without consultation of an accessible copartner it may be avoided by him,[77] and passes no more than the interest of the transferring partner.[78] A partner who has implied power to sell personal property of the firm in the course of its business, has power to bind it by a warranty incidental to the sale.[79] His power as to a deed with covenants of general warranty is very limited.[80]

§ 445. Power to purchase property.—A partner may, as we have seen heretofore, sell or mortgage property of the firm, and may incur firm obligations and sign the name of the partnership to evidences of firm obligation. It would necessarily follow as a part, perhaps, of the right to incur firm obligations, and as implied from the other powers mentioned above, that he would be empowered, under certain qualifications, that is, within the scope of the firm business, to purchase such goods as are necessary to carry on its business in an ordinary way, and may pledge the firm credit for such purchases, and this rule applies in both trading and nontrading partnerships,[81] and the creditor

[76] Hunter v. Wayneck, 67 Iowa 555, 25 N. W. 776; Blaker v. Sands, 29 Kans. 551.

[77] McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338.

[78] Ruffner v. McConnell, 17 Ill. 212, 63 Am. Dec. 362; Steinhart v. Fyhrie, 5 Mont. 463, 6 Pac. 367.

[79] Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738; Edwards v. Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199; Kemp v. Miller, 46 Ill. App. 213; Janney v. Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. 460; Sweet v. Bradley, 24 Barb. (N. Y.) 549; Erringer v. Miller, 3 Phila. (Pa.) 344.

[80] Ruffner v. McConnell, 17 Ill. 212, 63 Am. Dec. 362.

[81] Hoffmaster v. Hodges, 154 Mich. 641, 118 N. W. 484; McPherson v. Bristol, 122 Mich. 354, 81 N. W. 254; Vaiden v. Hawkins (Miss.), 6 So. 227; Morgan v. Pierce, 59 Miss. 210; Israel v. Finkelstein, 74 N. H. 604, 69 Atl. 576; Ketcham Nat. Bank v. Hagen, 164 N. Y. 446, 58 N. E. 523; Wells v. Gates, 18 Barb. (N. Y.) 554; Johnston v. Bernheim, 86 N. Car. 339; Dickson v. Alexander, 29 N. Car. 4; Crary v. Williams, 2 Ohio 65; Kenney v. Altvater, 77 Pa. St. 34; Venable v. Levick, 2 Head (Tenn.) 351; Hatchett v. Sunset Brick &c. Co. (Tex. Civ. App.), 99 S. W. 174; Rose v. Murchie, 2 Call (Va.) 409; Hudson's Bay Co. v. Stewart, 6 Manitoba 8.

can rely on the partner's apparent authority.[82] Of course a firm dealing in merchandise can bind the firm by a purchase of such merchandise as the partnership sells in its business,[83] even, it has been held, though the copartners oppose the purchase.[84] Thus when the firm credit is pledged the firm is bound, or when a partner in a livery business buys horses,[86] or a partner in a firm of contracting carpenters orders lumber to be used by the firm,[87] or a partner purchases supplies for a partnership plantation,[88] or a partner in a butcher business buys cattle,[89] or a member of a firm of general merchants purchases a storehouse and stationery.[90]

So, if the purchase of real estate is within the scope and course of the partnership business the firm may be bound by the contract of one partner to buy land,[91] and one partner in a firm engaged in buying and selling lands may purchase an outstanding title against their lands,[92] although in one case it was held that a purchase of land by one partner did not bind the firm, because the quantity contracted for was so large as to be outside the course of trade,[93] and in Louisiana a partner in a commercial partnership has no implied power to purchase land for his firm.[94] It has been held a partner in a law firm may bind his partner by buying law books reasonably necessary to carry on the business.[95] A partnership will not be bound for a purchase made by

[82] Flock v. Williams, 175 Ill. App. 319; Barton v. Ash (Tex. Civ. App.), 154 S. W. 608.

[83] Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Johnson v. Barry, 95 Ill. 483; Thompson v. Gosserand, 131 La. 1056, 60 So. 682; Dennistoun v. Debuys, 6 Mart. (N. S.) (La.) 48; Smith &c. Co. v. Schmidt, 142 Mich. 1, 105 N. W. 39; J. A. Ruhl Clothing Co. v. Singleton, 161 Mo. App. 366, 143 S. W. 529; Bond v. Gibson, 1 Campb. 185.

[84] Richardson v. Thacher (Tex.), 1 White & W. Civ. Cas. Ct. App., § 138.

[86] Chapple v. Davis, 10 Ind. App. 494, 38 N. E. 355.

[87] McDonald v. McLeod, 3 Colo. App. 344, 33 Pac. 285.

[88] Lowenberg v. Lewis-Herman Co., 94 Miss. 916, 48 So. 517.

[89] McFadden v. Shanley (Ariz.), 141 Pac. 732.

[90] Davis v. Cook, 14 Nev. 265.

[91] Wormser v. Meyer, 54 How. Pr. (N. Y.) 189; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

[92] Grant v. McArthur, 153 Ky. 356, 155 S. W. 732.

[93] Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

[94] Kemper v. Smith, 3 Mart. (O. S.) (La.) 622.

[95] Alley v. Bowen-Merrill Co., 76 Ark 4, 88 S. W. 838, 113 Am. St. 73.

one partner for a strictly private purpose foreign to the partnership business, which the seller knew.[96] Nor has a partner in a firm of commission merchants the implied authority to buy any property.[97] It is without the scope of the firm business when a partner in a seed-growing and selling firm buys flowers, and such purchase from one who knows the firm business does not bind the firm.[98] Partners are not liable for purchases by a partner without the scope of the business, except by authorization or adoption of his act.[99] Where a person dealing with the firm has notice that one partner has refused to be liable for goods purchased by the other partner, the partner giving notice is not bound by a sale to the other partner.[1] A partner who buys goods apparently as an individual is alone liable on his contract.[2] A partner's misappropriation to his own use of goods purchased within the scope of the firm business, does not relieve the firm from liability,[3] nor does his intention to defraud his copartners, where the seller is not aware of it.[4]

§ 446. Power to hire or lease property for firm.—A partner may hire property for the firm if such transaction falls within

[96] Gullat v. Tucker, 2 Cranch (U. S.) 33, Fed. Cas. No. 5866; Vinegar Bend Lumber Co. v. Howard, 186 Ala. 451, 65 So. 172; Eady v. Newton Coal &c. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Gray v. Tiernan, 18 La. 53; Riverside Lumber Co. v. Lee, 7 Tex. Civ. App. 522, 27 S. W. 161; McBain v. Austin, 16 Wis. 87, 82 Am. Dec. 705.

[97] Alabama Fertilizer Co. v. Reynolds, 85 Ala. 19, 4 So. 639.

[98] Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122.

[99] Alabama Fertilizer Co. v. Reynolds, 85 Ala. 19, 4 So. 639; Sutton v. Weber, 127 Iowa 361, 101 N. W. 775; Hyslop v. Johnson, 30 Ky. L. 379, 98 S. W. 993; Hazard v. Boyd, 4 Mart. (N. S.) (La.) 347; Norton v. Thatcher, 8 Nebr. 186; Bankhead v. Alloway, 6 Coldw. (Tenn.) 56; Hendricks v. Cameron, 3 Tex. App. Civ. Cas., § 261.

[1] Dawson v. Elrod, 105 Ky. 624, 49 S. W. 465, 20 Ky. L. 1436, 88 Am. St. 320; Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Sladen v. Lance, 151 N. Car. 492, 66 S. E. 449.

[2] Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066; Heckert v. Fegely, 6 Watts & S. (Pa.) 139; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; Emly v. Lye, 15 East 7.

[3] Bond v. Gibson, 1 Campb. 185.

[4] Clark v. Johnson, 90 Pa. St. 442; Kenney v. Altvater, 77 Pa. St. 34; Carver v. Dows, 40 Ill. 374.

the scope of the firm business.[5] As regards the lease under seal to others by one partner in the name of the firm of real property of the firm his copartners are not bound and their interest in the leased property does not pass unless they authorized or ratified the contract.[6] Nor can one partner surrender a lease on firm property without consulting his copartner, if the latter is reasonably accessible.[7] As a general rule one partner in a firm can not take a new lease, or a renewal of an existing one of the firm, in his own name or for his own benefit, and if he attempts to do so it inures to the benefit of the firm.[8]

§ 447. Power to insure firm property.—One partner has implied power to make a contract for the insurance of firm property which will bind the firm.[9] He also has power to consent to the surrender and cancelation of a policy,[10] and to make a settlement with the insurers in case of loss.[11]

[5] Stillman v. Harvey, 47 Conn. 26; Marks v. Chumos, 82 Kans. 562; 109 Pac. 397; Penn v. Kearny, 21 La. Ann. 21; Reynolds v. Swain, 13 La. 193; Bodey v. Cooper, 82 Md. 625, 34 Atl. 362; Koch v. Endriss, 97 Mich. 444, 56 N. W. 847; Webb v. Parks, 85 App. Div. 621, 83 N. Y. S. 66; Sweet v. Wood, 18 R. I. 386, 28 Atl. 335; Rhodius v. Storey, 1 Tex. App. Civ. Cas., § 336; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Sharp v. Milligan, 22 Beav. 606.

[6] Springer v. Simpson, 175 Ill. App. 631; Dillon v. Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700.

[7] Bergland v. Frawley, 72 Wis. 559, 40 N. W. 372.

[8] Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869n, Ann. Cas. 1912 B, 1095n; Speiss v. Rosswog, 96 N. Y. 651; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Struthers v. Pearce, 51 N. Y. 357; Betts v. June, 51 N. Y. 274; Chamberlin v. Chamberlin, 12 Jones & S. (N. Y.) 116; In re Johnson's Appeal, 115 Pa. St. 129, 8 Atl. 36, 2 Am. St. 539; Lacy v. Hall, 37 Pa. St. 360; Clegg v. Edmondson, 22 Beav. 125, 2 Jur. (N. S.) 824; Clegg v. Fishwick, 1 Macn. & G. 294, 1 Hall & Tw. 390, 19 L. J. Ch. 49, 13 Jur. 993; Featherstonhaugh v. Fenwick, 17 Ves. 298, 11 Rev. Rep. 77; Alder v. Fouracre, 3 Swanst. 489, 19 Rev. Rep. 256; Clements v. Hall, 2 DeG. & J. 173; Hawkins v. Hawkins, 4 Jur. (N. S.) 1044. See Keech v. Sandford, 1 White & T. Lead. Cas. in Eq. 44. However, if the lease is owned by one of the partners solely to the exclusion of the firm he may renew for his benefit. Phillips v. Reeder, 18 N. J. Eq. 95.

[9] Hooper v. Lusby, 4 Camp. 66.

[10] Hillock v. Traders Ins. Co., 54 Mich. 531, 20 N. W. 571.

[11] Brown v. Hartford Ins. Co., 117 Mass. 479.

§ 448. Power to appoint agents.—So far as a partner has the power to contract and bind the firm, he has power to appoint agents to carry on firm business. He is as to the firm both a principal and a general agent, and hence all members of the firm are bound by his appointment of an agent.[12] Thus, where a general partner has authority to execute a note in the firm name to obtain money for use in the partnership business, he may delegate to a clerk or agent such power.[13] Agents thus appointed are not merely agents of the appointing partner, but are agents of the firm, acting for all of its members and subject as much to the control of one partner as of another,[14] and all are liable to him for compensation for his services.[15] All the partners are liable for the consequences of his acts, even where they did not know that he was employed by the firm.[16] But in mining partnerships the appointment of an agent by one partner does not make him the agent of all for the reason that each partner in such a partnership is not an agent of the others and the firm.[17] A partnership may ratify the acts of its agents not ultra vires in character.[18]

[12] Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53. See Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Paton v. Baker, 62 Iowa 704, 15 N. W. 586; Bond Realty Co. v. Pounds, 128 App. Div. 91, 112 N. Y. S. 433; Tillier v. Whitehead, 1 Dall. (Pa.) 269, 1 L. ed. 131.

[13] Inman v. Brookman, 28 S. Dak. 361, 133 N. W. 810. See also Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Evans v. Evans, 82 Iowa 492, 48 N. W. 929; Tillier v. Whitehead, 1 Dall (Pa.) 269, 1 L. ed. 131.

[14] Johnston v. Brown, 18 La. Ann. 330; Ayer v. Ayer, 41 Vt. 302. See also Wheatley v. Tutt, 4 Kans. 240. In Rex v. Leech, 3 Stark. 70, the servant of a partnership is held the servant of each partner.

[15] Bartlett v. Powell, 90 Ill. 331; Froun v. Davis, 97 Ind. 401; Durgin v. Somers, 117 Mass. 55; Bodwell v. Eastman, 106 Mass. 525; Moist's Appeal, 74 Pa. St. 166; Carley v. Jenkins, 46 Vt. 721; Beckham v. Drake, 9 M. & W. 79.

[16] Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Ziegenheim v. Smith, 116 Ill. App. 80; Harvey v. McAdams, 32 Mich. 472.

[17] Charles v. Eshleman, 5 Colo. 107.

[18] Forbes v. Hagman, 75 Va. 168. See also Chouteau v. Goddin, 39 Mo. 229, 90 Am. Dec. 462; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324. In Louisiana it is held that the receiver of a partnership appointed by consent of the partners pending a suit for dissolution is the agent of the partners and not an officer of the court. Kellar v. Williams, 3 Rob. (La.) 321.

§ 449. Power to employ servants.—One partner may ordinarily bind his firm by a contract with another for services to be rendered by the latter in behalf and for the benefit of the partnership as a whole, especially if such act of employment is done in the ordinary course of the business.[19] Thus, a person may be employed to examine the books of a firm which has sold most of its property but not dissolved.[20] The firm is bound when the other partners by their conduct allow the person employed to assume that the contract is that of the firm, or when they have actually assented to it,[21] and the servant thus employed is the servant of the firm, not of the partner who employed him.[22] Moreover it has been held that not only in general, but in particular partnerships as well, each member is the agent of the firm and may bind it by his contracts in everything necessary to carry on its business, and in everything within the apparent scope thereof. Thus where partners for the construction of a school building employ a tradesman to do the plastering according to the plans of the architect and before the completion of the building one of the partners engages such tradesman to do additional plastering made necessary by the installation of the heating and ventilating apparatus, the last contract is within the appar-

[19] Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Lichenstein v. Murphree, 9 Ala. App. 108, 62 So. 444; Froun v. Davis, 97 Ind. 401; Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557; Boyd v. Watson, 101 Iowa 214, 70 N. W. 120; Mattingly v. Moore, 17 Ky. L. 220, 30 S. W. 870; Willard v. Wright, 203 Mass. 406, 89 N. E. 559; Durgin v. Somers, 117 Mass. 55; Bodwell v. Eastman, 106 Mass. 525; Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Cashman v. Lawson, 175 N. Y. 488, 67 N. E. 1081; Mead v. Shepard, 54 Barb. (N. Y.) 474; Burns v. Rowland, 40 Barb. (N. Y.) 368; Bank of North America v. Emsbury, 33 Barb. (N. Y.) 323; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230; Carley v. Jenkins, 46 Vt. 721; Hills v. Bailey, 27 Vt. 548; Fortis v. Hermanos, 6 Philippine 100. Compare Briggs v. Smith, 4 Daly (N. Y.) 110; Palliser v. Erhardt, 46 App. Div. (N. Y.) 222, 61 N. Y. S. 191.

[20] Reirden v. Stephenson, 87 Vt. 430, 89 Atl. 465.

[21] Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Brewer v. Wright, 25 Nebr. 305, 41 N. W. 159.

[22] Munroe v. Judson, 82 Hun 215, 31 N. Y. S. 299, 63 N. Y. St. 748; Wiley v. Logan, 95 N. Car. 358; Hills v. Bailey, 27 Vt. 548.

ent scope of the partnership business and recovery may be had thereon as against the firm notwithstanding the fact that, as between the partners themselves, the one entering into such contract was not authorized to act for the firm.[23] So, too, it has been held that where a partnership is composed of three married women and each of the three gives a power of attorney to her husband to transact the business for her, and the conduct of such business is then apportioned among the husbands, each of the latter is the agent of the firm as such and not alone of his own wife.[24] Again, it has been held that the employment by one partner of an attorney to defend a suit against the partnership does not preclude another member of the firm who feels insecure in the matter from binding his associates by a contract with a second attorney to assist in the defense.[25] But where a partnership has been formed to carry on the business of farming or planting it seems that no one of the partners has the implied authority, as a matter of law, under ordinary circumstances at least, to bind the firm for medicine and medical supplies furnished by a practicing physician to the laborers employed on the farm or plantation.[26] Again when it is manifest that the contract was not executed in good faith, the partnership will not be liable thereon especially when a contrary holding would prejudice its bona-fide creditors.[27] So also where one partner agrees to furnish the money-capital and the other the labor, the latter will not bind the firm by his employment of another, with knowledge, to render services for the use and benefit of the partnership.[50] Moreover, it has been held that a partnership will not be liable to an employé, engaged by it at a stipulated price, for additional compensation guaranteed to him after he has rendered his required services by one of the partners who has not received

[23] Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557.

[24] Munroe v. Judson, 82 Hun 215, 31 N. Y. S. 299, 63 N. Y. St. 748.

[25] Appeal of Messinger, 43 Leg. Int. (Pa.) 101. See also Wheatley v. Tutt, 4 Kans. 240.

[26] Woodruff v. Scaife, 83 Ala. 152, 3 So. 311.

[27] Beste v. His Creditors, 15 La. Ann. 55.

[50] Pollock v. Williams, 42 Miss. 88. See also Dooner v. Haws, 21 Misc. 639, 47 N. Y. S. 1112; Connell v.

the consent of his associates thus to do.[51] A partner has no right as between himself and his partners, to employ servants when there is an agreement denying this right, yet such a contract of employment would be binding on the partnership as to the rights of the employé thereunder, provided he had no knowledge of the restriction upon the partner.[52] If the servant knows that the employment is by the partner personally to perform services such partner owes the firm, he can not hold the firm.[53] From the fact that the employment is not in the ordinary course of business, the employé may be held to knowledge that the partner was not authorized to make him the servant of the firm.[54]

§ 450. Power to collect and pay debts.—There is no right and power of a partner better or more universally recognized than the right to collect and pay debts for the firm. The right is strengthened by the peculiar rules of partnership law as to the liability of each partner for firm debts. As to payment of debts, each partner can be compelled by the creditor to pay the claim, whether he wishes to or not, and can by means of the well-known principle of contribution, which is discussed elsewhere herein, compel the other partners to pay their proportion. This rule has been held applicable where a partner pays firm debts by the use of his individual property, since by such transfer the firm debt is extinguished.[55] This is not a fraud on the partner's separate creditors.[56] And each partner, since he has the right to have firm

Alexander, 21 Misc. 644, 47 N. Y. S. 1115.

[51] Conn v. Conn, 22 Ore. 452, 30 Pac. 230. Compare Carley v. Jenkins, 46 Vt. 721.

[52] Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53 (1851).

[53] Pollock v. Williams, 42 Miss. 88; Briggs v. Smith, 4 Daly (N. Y.) 110; Conn v. Conn, 22 Ore. 452, 30 Pac. 230.

[54] Beste v. His Creditors, 15 La. Ann. 55.

[55] Cannon v. Wildman, 28 Conn. 472; Osborn v. Osborn, 36 Mich. 48; Jarman v. Ellis, 52 N. Car. 77; Tyson v. Pollock, 1 Penn. & W. (Pa.) 375; Sprague v. Ainsworth, 40 Vt. 47; Watson v. Woodman, L. R. 20 Eq. 721; Innes v. Stephenson, 1 M. & Rob. 145. And see Schmidt v. Foucher, 38 La. Ann. 93; Bradbury v. Barnes, 19 Cal. 120; Booth v. Farmers' &c. Nat. Bank, 74 N. Y. 228. Compare also Barker v. Blake, 11 Mass. 16.

[56] Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350, 4 Sad. 297.

property applied to the payment of its debts, may pay firm debts by transferring firm property.[57] If the same person is a creditor of the partnership and also of one of its individual partners, payments by the latter out of partnership funds must be applied to the partnership debt,[58] unless the other partners consent to its application to the partner's debt.[59] But if a partner pays his own individual money to a creditor who is also a creditor of the partnership the money must first be applied to his individual debt, unless he agrees to its application on the firm debt.[60] As to the collection of accounts outstanding, it is a recognized rule that it is within the scope of a partner's authority to accept payments of firm claims, in the absence of an agreement to the contrary,[61] and a creditor may, as a general

[57] Ullman v. Myrick, 93 Ala. 532, 8 So. 410; Bernheim v. Porter, 65 Cal. xix, 4 Pac. 446 (1884); Randolph Bank v. Armstrong, 11 Iowa 515; Murrell v. Murrell, 33 La. Ann. 1233; Hodges v. Harris, 6 Pick. (Mass.) 360; Waite v. Vinson, 14 Mont. 405, 36 Pac. 828; Schneider v. Schmidt, 82 N. J. Eq. 81, 88 Atl. 179; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Wenham v. Campbell, 4 Ohio Dec. 122, 1 Clev. Law. Rep. 47; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Barnet v. Houston, 18 Tex. Civ. App. 134, 44 S. W. 689. See § 444, on selling firm property.

[58] Downing v. Linville, 3 Bush (Ky.) 472; Campbell v. Mathews, 6 Wend. (N. Y.) 551; Nottidge v. Prichard, 8 Bligh 493; Thompson v. Brown, M. & M. 40.

[59] Farris v. Morrison, 66 Ark. 318, 50 S. W. 693; Davis v. Smith, 27 Minn. 390, 7 N. W. 731; Cornells v. Stanhope, 14 R. I. 97; Wiesenfeld v. Byrd, 17 S. Car. 106; Rogers v. Betterton, 93 Tenn. 630, 27 S. W. 1017.

[60] Gass v. Stinson, 3 Sumn. (U. S.) 98, 10 Fed. Cas. No. 5262; Lewis v. Pease, 85 Ill. 31; Flarsheim v. Brestrup, 43 Minn. 298, 45 N. W. 438; Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Lee v. Larkin, 125 App. Div. 302, 109 N. Y. S. 480; Miles v. Ogden, 54 Wis. 573, 12 N. W. 81.

[61] Mosby v. United States, 194 Fed. 346; Little v. Britton (Ala.), 66 So. 694; Noyes v. New Haven &c. R. Co., 30 Conn. 1; Heartt v. Walsh, 75 Ill. 200; Gregg v. James, 1 Ill. 143, 12 Am. Dec. 151; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; Chase v. Buhl Iron-works, 55 Mich. 139, 20 N. W. 827; Vanderburgh v. Bassett, 4 Minn. 242; Chapin v. Clenitson, 1 Barb. (N. Y.) 311; Shepard v. Ward, 8 Wend. (N. Y.) 542; McKee v. Stroup, Rice (S. Car.) 291; Allen v. Farrington, 2 Sneed. (Tenn.) 526; Scott v. Trent, 1 Wash. (Va.) 77; Brasier v. Hudson, 9 Sim. 1; Collins v. Collins, 26 Ky. L. 1037, 83 S. W. 99; People v. Devlin, 63 Misc. 363, 118 N. Y. S. 478; Salmon v. Davis, 4 Bin. (Pa.) 375, 5 Am. Dec. 410.

rule, rely on a payment made to a partner,[62] unless he has notice that the partner is not authorized to receive payments.[63] Likewise if the same person is debtor to the firm and to an individual partner payments by him to a partner should first be applied to the discharge of the debt to the firm.[64]

§ 451. Power to make releases, settle and compromise.— A partner also has power to give receipts for payments and releases of debts,[65] which, if fraudulent, may be impeached by the firm.[66] Thus, one partner of a firm may sign a deed of composition and release a debt due the firm.[67] But a release in his own name of a partnership debt binds the firm.[68] He has the power to receive negotiable paper, or in some instances, goods which may be used in the firm business in payment of debts.[69] A copartner may be bound by fraud of his copartner in obtaining a release of a mechanic's lien.[70] A partner also has power to settle and compromise disputed claims of the firm or against it without the knowledge and participation of the other partners if he acts reasonably and in good faith,[71] and, in the absence

[62] Mosby v. United States, 194 Fed. 346.

[63] Clark v. Lauman, 63 Ill. App. 132.

[64] Eaton v. Whitcomb, 17 Vt. 641; Scott v. Trent, 1 Wash. (Va.) 77.

[65] Dyer v. Sutherland, 75 Ill. 583; Gordon v. Freeman, 11 Ill. 14; Emerson v. Knower, 8 Pick. (Mass.) 63; Salmon v. Davis, 4 Bin. (Pa.) 375, 5 Am. Dec. 410; Henderson v. Wild, Camp. 561.

[66] Gordon v. Albert, 168 Mass. 150, 46 N. E. 423.

[67] Myrick v. Dame, 9 Cush. (Mass.) 248; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342; Bruen v. Marquand, 17 Johns. (N. Y.) 58; Fitch v. Forman, 14 Johns. (N. Y.) 172; Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Wells v. Evans, 20 Wend. (N. Y.) 251; Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153.

[68] Brown v. Laurence, 5 Conn. 397; White v. Jones, 14 La. Ann. 681.

[69] Heartt v. Walsh, 75 Ill. 200; Lee v. Hamilton, 12 Tex. 413; Tomlin v. Lawrence, 3 Moore & P. 555.

[70] Tuttle v. Harris (N. J. Eq.), 92 Atl. 596.

[71] Beltzhoover v. Stockton, 4 Cranch (U. S.) 695, Fed. Cas. No. 1283; Mortimore v. Atkins, 98 Ark. 183, 135 S. W. 865; Nicklase v. Griffith, 59 Ark. 641, 26 S. W. 381; Greek American Produce Co. v. Pappas, 9 Ala. App. 311, 63 So. 799; Hawn v. Seventy-six Land &c. Co., 74 Cal. 418, 16 Pac. 196; Cannon v. Wildman, 28 Conn. 472; Dyer v. Sutherland, 75 Ill. 583; Leafgreen v. Telford, 169 Ill. App. 582; Yandes v. Lefavour, 2 Blackf.

of fraud, such settlement is binding on the other partners.[72] Members of a firm may be bound by a compromise of a firm debt by which they accept less than the amount actually due them.[73]

§ 452. Power to alter contracts.—The power of a partner to alter or rescind a contract of the firm is usually measured by his authority to have made such a contract in its inception. If he can bind the firm by executing for it an original contract of the same character, then he can rescind or alter a firm contract already made.[74] The attempted alteration or rescission of a firm contract by a partner, in the exercise of a power not ordinarily incident to the conduct of the partnership business, does not bind the firm unless assented to or authorized by the copartners.[75]

§ 453. Power to make acknowledgment or affidavit.—Where one partner has the power in law to bind the firm by his execution of an instrument, his acknowledgment of such instrument if executed by him is sufficient, also if the other partners have given him authority to execute and acknowledge an instrument, his acknowledgment is sufficient.[76] If all have executed

(Ind.) 371; Holderman v. Tedford, 7 Kans. App. 657, 53 Pac. 887; Collins v. Collins, 26 Ky. L. 1037, 83 S. W. 99; Walker v. Yellow Poplar Lumber Co., 18 Ky. L. 76, 35 S. W. 272; White v. Jones, 14 La. Ann. 681; Smith v. Stone, 4 Gill & Johns. (Md.) 310; Emerson v. Knower, 8 Pick. (Mass.) 63; Cook v. Blake, 98 Mich. 389, 57 N. W. 249; Anable v. McDonald Land & Min. Co., 144 Mo. App. 303, 128 S. W. 38; Allen v. Cheever, 61 N. H. 32; Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Gates v. Pollock, 50 N. Car. 344; De Haven v. Coup, 5 Ohio Dec. 562, 6 Am. L. Rec. 593; Salmon v. Davis, 4 Bin. (Pa.) 375, 5 Am. Dec. 410; Stout v. Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808; Henderson v. Wild, 2 Campb. 561.

[72] South Fork Canal Co. v. Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894; Busby v. Rooks, 72 Ark. 657, 81 S. W. 1056; Adams v. Long, 114 Ill. App. 277; People v. Devlin, 63 Misc. 363, 118 N. Y. S. 478; Storrie v. Ft. Worth Stockyards Co. (Tex. Civ. App.), 143 S. W. 286; Farrar v. Hutchinson, 9 A. & E. 641.

[73] Storrie v. Ft. Worth Stockyards Co. (Tex. Civ. App.), 143 S. W. 286.

[74] Shellito v. Sampson, 61 Iowa 40, 15 N. W. 572; Harper v. McKinnis, 53 Ohio St. 434, 42 N. E. 251.

[75] Jones v. Anderson, 76 Ala. 427; Aultman &c. Co. v. Shelton, 90 Iowa 288, 57 N. W. 857; Custard v. Hodges, 155 Mich. 361, 119 N. W. 583.

[76] McCoy v. Boley, 21 Fla. 803; Citizens' Nat. Bank v. Johnson, 79

the instrument, it seems all must acknowledge it.[77] Where express authority from the copartners is necessary before one partner can execute a contract, then acknowledgment by one partner of such a contract is prima facie insufficient and evidence of authority or ratification must be shown.[78] It is not necessary that the name of the partner acknowledging should appear in the firm name, if it is shown from the acknowledgment that the partner acknowledged it for the firm whose contract it appeared to be.[79] But an acknowledgment in the firm name not stating what member of the firm acknowledged it is insufficient.[80] A partner has power on behalf of the firm to make affidavits required in certain actions.[81]

§ 454. Power to make contract of guaranty or suretyship, or bond.—The making of a contract of guaranty or suretyship is so far outside the scope of an ordinary partnership business that undoubtedly one partner can have no power to make such a contract as the agent of the firm. The purpose of a partnership is to engage in business for profit and this precludes the idea of guaranteeing the performance of other persons' contracts or the payment of their debts. Hence there is no implied power of one partner to bind the firm to a contract of guaranty or suretyship.[82] As a general rule, one member of a partnership

Iowa 290, 44 N. W. 551; Klumpp v. Gardner, 114 N. Y. 153, 21 N. E. 99; McCulloch County Land &c. Co. v. Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042; Leon & H. Blum Land Co. v. Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473. See also Malloye v. Coubrough, 96 Cal. 649, 31 Pac. 622; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Keck v. Fisher, 58 Mo. 532; National Bank v. Scriven, 63 Hun 375, 18 N. Y. S. 277.

[77] Sanders v. Pepoon, 4 Fla. 465.

[78] Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Ann. Cas. 1913 A, 1081 and note; Walton v. Tusten, 49 Miss. 569; Shirley v. Fearne, 33 Miss. 653, 69 Am. Dec. 375.

[79] Keck v. Fisher, 58 Mo. 532.

[80] Hughes v. Morris, 110 Mo. 306, 19 S. W. 481; Sloan v. Owens &c. Mach. Co., 70 Mo. 206. Contra: Barrow v. Conlee, 89 Ill. App. 625.

[81] Standard Carbonating & Supply Co. v. Capital City Guards, 99 Ga. 265, 25 S. E. 670; Reed v. Carlson, 89 Minn. 417, 95 N. W. 303; Hampton v. Bogan, 55 S. Car. 547, 33 S. E. 581.

[82] Burke v. Mountain Timber Co., 224 Fed. 591; Mauldin v. Mobile Branch Bank, 2 Ala. 502; Lewin v.

has no right to lend the credit of the firm to a stranger, unless it is done in the course of the firm's business.[83] If it can be shown that such a contract is an incident in the usual course of business of the firm, as a banking firm,[84] or to the previous course of dealing between the parties,[85] or was actually authorized by the other partners,[86] or that they ratified it,[87] then the firm may be held on such contract. Even if the firm is interested in a transaction it has been held that one partner does not have authority to bind it by guaranteeing negotiable paper of a third person, unless it was necessary to carry on the firm business in the usual way.[88] Authorization or ratification must be unequivocally proved and will not be presumed.[89] It is not neces-

Barry, 15 Colo. App. 461, 63 Pac. 121; Mayberry v. Bainton, 2 Harr. (Del.) 24; Hollister v. Bluthenthal, 9 Ga. App. 176, 70 S. E. 970; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; McCormick Harvesting Machine Co. v. Reiner, 4 Kans. App. 725, 46 Pac. 539; Rollins v. Stevens, 31 Maine 454; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260; Persons v. Oldfield, 101 Miss. 110, 57 So. 417; Vaiden v. Hawkins (Miss.), 6 So. 227 (1889); Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n; Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co., 86 Mo. App. 438; Boyd v. Plumb, 7 Wend. (N. Y.) 309; Charman v. McLane, 1 Ore. 339; Sutton v. Irwine, 12 Serg. & R. (Pa.) 13; Olive v. Morgan, 8 Tex. Civ. App. 654, 28 S. W. 572; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875; Duncan v. Lowndes, 3 Campb. 478; Marks v. Wright, 1 N. Brunsw. 174.

[83] Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875.

[84] First Nat. Bank of Pipestone v. Rowley, 92 Iowa 530, 61 N. W. 195; First Nat. Bank v. Carpenter, 41 Iowa 518; McNeal v. Gossard, 6 Okla. 363, 50 Pac. 159.

[85] Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Cameran v. Blackman, 39 Mich. 108. See also Sutton v. Irwine, 12 Serg. & R. (Pa.) 13; Jordan v. Miller, 75 Va. 442; Day v. McLeod, 18 U. C. Q. B. 256.

[86] Cunningham v. Lamar, 51 Ga. 574; Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458; Boyd v. Plumb, 7 Wend. (N. Y.) 309.

[87] Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Clark v. Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Sutton v. Irwine, 12 Serg. & R. (Pa.) 13.

[88] Clarke v. Wallace, 1 N. Dak. 404, 48 N. W. 339, 26 Am. St. 636.

[89] Moran v. Prather, 23 Wall. 492, 23 L. ed. 121; Marsh v. Thompson Nat. Bank, 2 Ill. App. 217; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co., 86 Mo. App. 438; Pinckney v. Keyler, 4 E. D. Smith (N. Y.) 469; Mercein v. Andrus, 10

sary, however, that the authorization or ratification be express; it may be implied.[90] The partner making an unauthorized guaranty contract in the firm name is bound thereby.[91] Indorsing or accepting negotiable paper as an accommodation to another is but a modified form of suretyship, and therefore the rule applies that one partner has no implied power to bind the firm by such an act.[92] But, like most acts of a partner outside of his authority, an accommodation indorsement of the firm name by him may be authorized or ratified.[93] The liability of the members of a partnership as an accommodation indorser is joint, not several.[94] If there is nothing on the face of the paper to show that the partnership is an accommodation indorser, it is liable to an innocent third purchaser for value.[95] But even this rule may be qualified by the nature and usages of the partnership business.[96] As a rule a partner can not bind the firm by executing a bond,[97]

Wend. (N. Y.) 461; McGuire v. Blanton, 5 Humph. (Tenn.) 361.

[90] Clark v. Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Bloom v. Stern, 23 La. Ann. 747; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666.

[91] Gunderson v. Hasterlik, 100 Ill. App. 429; Boyd v. Plumb, 7 Wend. (N. Y.) 309.

[92] Ft. Madison Bank v. Alden, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. 332; Lang v. Waring, 17 Ala. 145; New York Firemen Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Presbrey v. Thomas, 1 App. D. C. 171; American Exchange Nat. Bank v. Georgia Constr. &c. Co., 87 Ga. 651, 13 S. E. 505; Whitmore v. Adams, 17 Iowa 567; Chenowith v. Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145; Darling v. March, 22 Maine 184; Heffron v. Hanaford, 40 Mich. 305; Andrews v. Planters' Bank, 7 Smed. & M. (Miss.) 192, 45 Am. Dec. 300; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; Wilson v. Williams, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518; Bowman v. Cecil Bank, 3 Grant (Pa.) 33; Bank of Tennessee v. Saffarrans, 3 Humph. (Tenn.) 597.

[93] Steuben County Bank v. Alburger, 101 N. Y. 202, 4 N. E. 341; Baldwin's Bank v. Morris, 63 Hun 625, 17 N. Y. S. 286, 42 N. Y. St. 585; Trullinger v. Corcoran, 81 Pa. St. 395; Flemming v. Prescott, 3 Rich. L. (S. Car.) 307, 45 Am. Dec. 766.

[94] Clipperton v. Spettigue, 15 Grant Ch. (U. C.) 269.

[95] Reed v. Bacon, 175 Mass. 407, 56 N. E. 716; Catskill Bank v. Stall, 15 Wend. (N. Y.) 364; Hawes v. Dunton, 1 Bailey L. (S. Car.) 146, 19 Am. Dec. 663.

[96] Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733.

[97] Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Smith v. Tupper, 4 Smed. & M. (Miss.) 261, 43 Am. Dec. 483; Wharton v. Woodburn, 20

unless by the authorization or consent of the other partners,[98] and as a rule only the individual obligor is bound.[99] But he may have a right of contribution against the other partners.[1] And some cases hold that a partner has the power to bind the firm by executing bonds of a certain character,[2] and others hold that equitable relief may be had, where ground is shown.[3]

§ 455. Power to pay individual debts with firm assets.—It is a well established rule of law that individual debts of a partner can not be paid out of partnership funds or with partnership property as between the partners themselves, without their consent.[4] There is no liability of a partnership for the debts

N. Car. 647; Hart v. Withers, 1 Penn. & W. (Pa.) 285, 21 Am. Dec. 382.

[98] United States v. Astley, 3 Wash. (U. S.) 508, Fed. Cas. No. 14472; Jeffreys v. Coleman, 20 Fla. 536; Gwinn v. Rooker, 24 Mo. 290; Kasson v. Brocker, 47 Wis. 79, 1 N. W. 418.

[99] Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Dickinson v. Legare, 1 Desaus. (S. Car.) 537.

[1] Green v. Walker, 5 Del. Ch. 26; Durant v. Rogers, 71 Ill. 121; 87 Ill. 508.

[2] Wallis v. Wallace, 6 How. (Miss.) 254; Walker v. Dickerson, 3 N. Car. 23; Grollman v. Lipitz, 43 S. Car. 329, 21 S. E. 272.

[3] Galt's Exrs. v. Calland's Exr., 7 Leigh (Va.) 594.

[4] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Cannon v. Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. 38; Nall v. McIntyre, 31 Ala. 532; Pierce v. Pass, 1 Port. (Ala.) 232; Gossett v. Morrow, 4 Ala. App. 306, 58 So. 799; Filley v. Phelps, 18 Conn. 294; Yale v. Yale, 13 Conn. 185, 33 Am. Dec. 393; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628; McGhees v. McCutchen, 82 Ga. 788, 9 S. E. 785; Jacksonville Nat. Bank v. Mapes, 85 Ill. 67; Janney v. Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. 460; Brewster v. Reel, 74 Iowa 506, 38 N. W. 381; Jackson v. Holloway, 14 B. Mon. (Ky.) 133; Cadwallader v. Kroesen, 22 Md. 200; Grover v. Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. 506; Brickett v. Downs, 163 Mass. 70, 39 N. E. 776; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Hinds v. Backus, 45 Minn. 170, 47 N. W. 655; Stegall v. Coney, 49 Miss. 761; Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641; Forney v. Adams, 74 Mo. 138; Caldwell v. Scott, 54 N. H. 414; Matlack v. James, 13 N. J. Eq. 126; Concord Const. Co. v. Plante, 137 App. Div. 243, 121 N. Y. S. 1026; Broaddus v. Evans, 63 N. Car. 633; Caldwell Banking &c. Co. v. Porter, 52 Ore. 318, 95 Pac. 1, 97 Pac. 541; Leonard v. Winslow, 2 Grant (Pa.) 139; Daugherty v. Haynes (Tex. Civ. App.), 28 S. W. 692 (1894); Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Viles v. Bangs, 36 Wis. 131; Assong v. Shoughing, 1 Hawaii 186.

of its individual members.[5] Nor has a partner the right to pledge firm credit for his individual debts.[6] But assent of the other members of the firm to the payment by one partner of individual debts with firm property may be shown or ratification of such act and the firm thus bound,[7] or it may be shown that their conduct has been such that they are estopped to deny the partner's authority.[8] If the other partners have not assented to or ratified the act of a partner in applying firm property to the payment of his individual debt and if they are not estopped, then such transfer does not pass their rights, and it does not matter that the debtor does not know that he was receiving partnership property in satisfaction of his debt.[9]

Mr. Justice Story said in one of his opinions: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself, and any disposition of those funds by any partner beyond such purposes is an excess of his authority as partner, and a misappropriation of those funds, for which

[5] Filley v. Phelps, 18 Conn. 294; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350; Union Mut. &c. Co. v. Doherty, 20 Misc. 23, 44 N. Y. S. 781.

[6] Cumner v. Butler, 45 Maine 434; Huttig Sash &c. Co. v. McMahon, 81 Mo. App. 440; Brown v. Pettit, 178 Pa. St. 17, 35 Atl. 865, 34 L. R. A. 723, 56 Am. St. 742; Ramey v. McBride, 4 Strob. (S. Car.) 12; Jones' Case, 1 Overt. (Tenn.) 455.

[7] Janney v. Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. 460; Mitchell v. Whaley, 29 Ky. L. 125, 92 S. W. 556; Hutchinson v. Brassfield, 86 Mo. App. 40; Lucker v. Iba, 54 App. Div. 566, 66 N. Y. S. 1019; Carter v. Beaman, 51 N. Car. 44; McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512; Kendall v. Wood, L. R. 6 Exch. 243.

[8] Grover v. Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. 506; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Flanagan v. Alexander, 50 Mo. 50; Ross v. Whitefield, 36 N. Y. Super. Ct. 50; Foster v. Andrews, 2 Penn. & W. (Pa.) 160; Miller v. Dow, 17 Vt. 235.

[9] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Cannon v. Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. 38; Brewster v. Mott, 5 Ill. 378; Janney v. Springer, 78 Iowa 617, 43 N. W. 461, 16 Am. St. 460; Buck v. Mosley, 24 Miss. 170; Hagar v. Graves, 25 Mo. App. 164; Geery v. Cockroft, 33 N. Y. Super. Ct. 146; Purdy v. Powers, 6 Pa. St. 492; Liberty Sav. Bank v. Campbell, 75 Va. 534; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192.

the partner is responsible to the partnership; though in the case of bona-fide purchasers without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, beyond the scope and objects of the partnership, must in general, in order to bind the partnership be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle, and in our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property or to bind the rights of another, unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the right of his partners, unless they have assented to it. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had. Does it make any difference that the separate creditor had no knowledge at the time that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud, not only in morals, but in law. * * * But we do not think that such knowledge is an essential ingredient in such a case. The true question is whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may reassert their claim to it in the hands of such creditor. * * * The true principle to be extracted from the authorities is that one partner can not apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not."[10] The cred-

[10] Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063.

itor who knowingly takes from one partner property of the firm in satisfaction of an individual debt, without the other partners' consent, is guilty of fraud as to them.[11]

It has been held[12] that a creditor can not knowingly take partnership property in payment of a partner's debt unless the other partners assent, or, in other words, that such a payment is not within the apparent scope of the partnership business. The apparent scope of authority in partnership relations is that authority which naturally and by custom arises by reason of the nature of the business and the actions of the partners. Even if the payment were assented to by the other partners, it could be set aside under certain conditions if it were in fraud of creditors of the firm, for, as we shall see hereafter, under the bankruptcy laws, firm creditors are preferred as to firm assets over the creditors of a separate partner, on his individual debt. The consent of the other partners is necessary before a partner can discharge a debt due the firm by setting off his individual debt against it.[13] If such set-off has been made and the firm debt apparently discharged, the copartners are entitled to relief in equity,[14] but

[11] Johnson v. Crichton, 56 Md. 108; Williams v. Brimhall, 13 Gray (Mass.) 462; Forney v. Adams, 74 Mo. 138; Hagar v. Graves, 25 Mo. App. 164; Venable v. Levick, 2 Head (Tenn.) 351.

[12] Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 N. W. 165 (1896).

[13] Cowen v. Eartherley Hdw. Co., 95 Ala. 324, 11 So. 195; Witherington v. Huntsman, 64 Ark. 551, 44 S. W. 74; Eady v. Newton Coal &c. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; McNair v. Platt, 46 Ill. 211; Bates v. Halliday, 3 Ind. 159; Thomas v. Stetson, 62 Iowa 537, 17 N. W. 751, 49 Am. Rep. 148; Chase v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827; Minor v. Gaw, 11 Smed. & M. (Miss.) 322; Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 N. W. 165; Evernghim v. Enswood, 7 Wend. (N. Y.) 326; Carter v. Beaman, 51 N. Car. 44; Thomas v. Pennrich, 28 Ohio St. 55; Todd v. Lorah, 75 Pa. St. 155; Pepper v. Peck, 17 R. I. 55, 20 Atl. 16; Wilson v. Dargan, 4 Rich. L. (S. Car.) 544; Nugent v. Allen, 95 Tenn. 97, 32 S. W. 91; Goode v. McCartney, 10 Tex. 193; Woolson v. Fuller, 71 Vt. 335, 45 Atl. 753; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539; Piercy v. Fynney, L. R. 12 Eq. 69; Fisher v. Linton, 28 Ont. 322.

[14] Hoff v. Rogers, 67 Miss. 208, 7 So. 358, 19 Am. St. 301; Craig v. Hulschizer, 34 N. J. L. 363; Cor-

it seems an action at law is generally not maintainable,[15] though some authorities incline to a contrary view.[16] Where a creditor held a note against copartners, and it was agreed by all that, in consideration of the transfer by one partner to the others of all his interest in the partnership property, the latter would pay the note, this was held a valid accord and satisfaction.[17]

§ 456. Power to institute litigation.—It follows from the power to collect debts that each partner has the power to use ordinary legal process to enforce such collection. Therefore, one partner may engage attorneys to sue in behalf of the firm, and it is held may even execute a power of attorney under seal for such purpose.[18] Any partner may perfect a mechanic's lien in the firm name for the firm.[19] The power to sue on behalf of the firm also involves the power to defend suits against it, and to employ counsel to appear for the firm.[20] Such appearance binds the members of the firm as partners, not as individuals, and it is held that such appearance is not binding individually upon a partner in another jurisdiction who did not authorize it.[21] Though one partner does not need the consent of the others to sue, if he sues against their will, he should indemnify them

nells v. Stanhope, 14 R. I. 97; Midland Counties R. v. Taylor, 8 H. L. Cas. 751.

[15] Bumpus v. Turgeon, 98 Maine 550, 57 Atl. 883; Horner v. Wood, 11 Cush. (Mass.) 62; Chase v. Bean, 58 N. H. 183; Craig v. Hulschizer, 34 N. J. L. 363.

[16] Busby v. Rooks, 72 Ark. 657, 81 S. W. 1056; McNair v. Wilcox, 121 Pa. St. 437, 15 Atl. 575, 6 Am. St. 799.

[17] Nassoiy v. Tomlinson, 65 Hun 491, 20 N. Y. S. 384, 48 N. Y. St. 182; Hills v. Sommer, 53 Hun 392, 6 N. Y. S. 469, 25 N. Y. St. 1003; Looby v. West Troy, 24 Hun (N. Y.) 78. See also McKeen v. Morse, 49 Fed. 253, 1 C. C. A. 237, 1 U. S. App. 7.

[18] In re Barrett, 2 Hughes (U. S.) 444, Fed. Cas. No. 1043; Wheatley v. Tutt, 4 Kans. 240.

[19] German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314; Jones v. Hurst, 67 Mo. 568.

[20] Wheatley v. Tutt, 4 Kans. 240; Bennett v. Stickney, 17 Vt. 531.

[21] Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56. Compare Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; and Haslet v. Street, 2 McCord (S. Car.) 310, 13 Am. Dec. 724n.

for costs.[22] A partner has power to assign a judgment recovered by the firm.[23]

§ 457. **Power to confess judgment.**—The general rule is that without special authority a partner by confessing judgment for a firm debt can not bind his copartners' estate.[24] This rule is followed by the Uniform Partnership Act.[25] In Pennsylvania, before the adoption of the Uniform Partnership Act, the rule was that a confession of judgment by one partner in the firm name for a firm debt, binds the partner confessing and the partnership property, but does not bind a partner not consenting either individually or as to his separate estate,[26] nor could one partner bind the person or separate estate of a nonassenting partner by executing judgment notes under seal in the firm name.[27] Assent or ratification by the copartners will make the firm liable.[28] The judgment is usually held binding on the partner who assumed to confess to it,[29] and has been held to

[22] Kuhn v. Weil, 73 Mo. 213; Ward v. Barber, 1 E. D. Smith (N. Y.) 423; Whitehead v. Hughes, 2 Cromp. & M. 318.

[23] Little v. Britton (Ala.), 66 So. 694.

[24] Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Buchanan v. Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899; Seal v. Seal, 1 Houst. (Del.) 516; Harper v. Cunningham, 8 App. D. C. 430; Hier v. Kaufman, 134 Ill. 215, 25 N. E. 517; Sloo v. State Bank, 2 Ill. 428; Davenport Mills Co. v. Chambers, 146 Ind. 156, 44 N. E. 1109; North v. Mudge, 13 Iowa 496, 81 Am. Dec. 441; Soper v. Fry, 37 Mich. 236; Morgan v. Richardson, 16 Mo. 409, 57 Am. Dec. 235; Burr v. Mathers, 51 Mo. App. 470; Ellis v. Ellis, 47 N. J. L. 69; Crane v. French, 1 Wend. (N. Y.) 311; Richardson v. Fuller, 2 Ore. 179; Mills v. Dickson, 6 Rich. L. (S. Car.) 487; Shedd v. Bank of Brattleboro, 32 Vt. 709; Remington v. Cummings, 5 Wis. 138; Rathbone v. Drakeford, 6 Bing. 375; Huff v. Cameron, 1 Ont. Pr. 255.

[25] Uniform Partnership Act, § 9 (2) (d),

[26] Feighan v. Sobers, 239 Pa. 284, 86 Atl. 857; Adams v. James L. Leeds Co., 195 Pa. St. 70, 45 Atl. 666; Boyd v. Thompson, 153 Pa. St. 78, 25 Atl. 769, 34 Am. St. 685; Franklin v. Morris, 154 Pa. St. 152, 26 Atl. 364.

[27] Funk v. Young, 241 Pa. 72, 88 Atl. 291.

[28] Edwards v. Pitzer, 12 Iowa 607; Werner v. Iler, 54 Nebr. 576, 74 N. W. 833; Overton v. Tozer, 7 Watts (Pa.) 331; Bivingsville Cotton Mfg. Co. v. Bobo, 11 Rich. (S. Car.) 386; Alexander v. Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; Brutton v. Burton, 1 Chit. 707.

[29] Davenport Mills Co. v. Chambers, 146 Ind. 156, 44 N. E. 1109; St. John v. Holmes, 20 Wend. 609,

bar another action against the firm on the same cause.[30] And a judgment against a firm upon a firm debt entered by confession upon a warrant of attorney executed by one partner without authority from the others is only voidable at the election of the partners who did not assent, and not void, and is valid, as to firm creditors against their attack.[31] However creditors may impeach such a judgment on confession if actually fraudulent.[32] The nonconsenting partner in different jurisdictions may have the judgment opened,[33] or set aside,[34] or execution stayed.[35]

§ 458. Power to make assignment for the benefit of creditors.—The aim of a partnership is to promote and conduct some business or transaction, and the implied scope of a partner's authority is limited to acts incidental thereto. Hence, if a partner attempt to make an assignment for the benefit of creditors, and thereby divest his copartners from the possession and ownership of the firm property as a whole, an act tending to destroy the business, he is acting beyond his authority and the transfer is invalid.[36] This rule is followed by the Uniform

32 Am. Dec. 603. Contra: Seal v. Seal, 1 Houst. (Del.) 516.

[30] North v. Mudge, 13 Iowa 496, 81 Am. Dec. 441; Frisbie v. Larned, 21 Wend. (N. Y.) 450. But see under statutes, Yoho v. McGovern, 42 Ohio St. 11; Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; Kauffman v. Fisher, 3 Grant (Pa.) 302; Nathanson v. Spitz, 19 R. I. 70, 31 Atl. 690.

[31] Farwell v. Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. 237; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Rosenberg v. Boehm, 25 N. Y. S. 936, 56 N. Y. St. 76; Grazebrook v. McCreedie, 9 Wend. (N. Y.) 437; George W. McAlpin Co. v. Finsterwald, 57 Ohio St. 524, 49 N. E. 784; Grier v. Hood, 25 Pa. St. 430. Contra: Hickman v. Branson, 1 Houst. (Del.) 429.

[32] McCormick Harvesting Mach. Co. v. Coe, 53 Ill. App. 488; Everson v. Gehrman, 1 Abb. Pr. (N. Y.) 167, 10 How. Pr. 301; Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[33] Mellvain v. James I. Leeds Co., 189 Pa. St. 638, 42 Atl. 307.

[34] Sloo v. State Bank, 2 Ill. 428; Davenport Mills Co. v. Chambers, 146 Ind. 156, 44 N. E. 1109; McKee v. Mt. Pleasant Bank, 7 Ohio St. 175, Pt. 2; Bitzer v. Shunk, 1 Watts & S. (Pa.) 340, 37 Am. Dec. 469; Pitfield v. Oakes, 25 Nova Scotia 116; Berg v. Commercial Nat. Bank, 84 Ill. App. 614 (not unless there is a showing of injury).

[35] Green v. Beals, 2 Cai. (N. Y.) 254.

[36] Parker v. Brown, 85 Fed. 505

Partnership Act.[37] There must be actual authority shown, to make such assignment valid,[38] but this may be implied from the conduct of the partners,[39] or the circumstances.[40] The above general rule that the firm is not bound by one partner's assignment for benefit of creditors has been held not to apply where one partner is absent from the country on an extended trip and can not be recalled quickly,[41] also when the nonassigning partner has absconded and abandoned the business.[42] The contrary

29 C. C. A. 357; Adams v. Thornton, 82 Ala. 260, 3 So. 20; Wilcox v. Jackson, 7 Colo. 521, 4 Pac. 966; Mills v. Miller, 109 Iowa 688, 81 N. W. 169; Loeb v. Pierpont, 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122; Shattuck v. Chandler, 40 Kans. 516, 20 Pac. 225, 10 Am. St. 227; Maughlin v. Tyler, 47 Md. 545; Kirby v. Ingersoll, 1 Doug. (Mich.) 477, Harr. 172; Foot v. Goldman, 68 Miss. 529, 10 So. 62; Steinhart v. Fyhrie, 5 Mont. 463, 6 Pac. 367; Coope v. Bowles, 42 Barb. 87, 18 Abb. Pr. 442, 28 How. Pr. (N. Y.) 10; Havens v. Hussey, 5 Paige (N. Y.) 30; Postman v. Rowan, 65 Misc. 50, 119 N. Y. S. 248; H. B. Clafflin Co. v. Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. 686; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952; Ormsbee v. Davis, 5 R. I. 442; Henderson v. Haddon, 12 Rich. Eq. (S. Car.) 393; Robinson v. Crowder, 4 McCord (S. Car.) 519, 17 Am. Dec. 762; Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69; Bell v. Beazley, 18 Tex. Civ. App. 639, 45 S. W. 401; Hill v. Postley, 90 Va. 200, 17 S. E. 946; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253; Harper v. Godsell, L. R. 5 Q. B. 422; Stevenson v. Brown, 9 Can. L. J. 110.

[37] Uniform Partnership Act, § 9 (2) (a) (c).

[38] Paul v. Cullum, 132 U. S. 539, 33 L. ed. 430, 10 Sup. Ct. 151; Callahan v. Heinz, 20 Ind. App. 359, 49 N. E. 1073; Tyler v. His Creditors, 9 Rob. (La.) 372; Metropolitan Trust Co. v. Northern Trust Co., 61 Minn. 462, 63 N. W. 1030; Mayer v. Bernstein, 69 Miss. 17, 12 So. 257; Klumpp v. Gardner, 114 N. Y. 153, 21 N. E. 99; Hennessy v. Western Bank, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560; Jackman v. Fortson (Tex. Civ. App.), 39 S. W. 215 (1896).

[39] Kirby v. Ingersoll, 1 Doug. (Mich.) 477, Harr. 172; Lowenstein v. Flauraud, 11 Hun (N. Y.) 399, 53 How. Pr. 463.

[40] Callahan v. Heinz, 20 Ind. App. 359, 49 N. E. 1073; Graves v. Hall, 32 Tex. 665; Rumery v. McCulloch, 54 Wis. 565, 12 N. W. 65.

[41] Forbes v. Scannell, 13 Cal. 242; H. B. Clafflin Co. v. Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. 686; Kellar v. Self, 5 Tex. Civ. App. 393, 24 S. W. 578; McCullough v. Sommerville, 8 Leigh (Va.) 415; Williams v. Gillispie, 30 W. Va. 586, 5 S. E. 210.

[42] Newhall v. Buckingham, 14 Ill. 405; Welles v. March, 30 N. Y. 344; Palmer v. Myers, 43 Barb. (N. Y.) 509, 29 How. Pr. 8; Kemp v. Carnley, 3 Duer (N. Y.) 1; Sullivan v. Smith, 15 Nebr. 476, 19 N. W. 620, 48 Am. Rep. 354; Deckard v. Case, 5

has been held in Maryland, where the court held that, where one of the partners absconded from the state, the remaining partner could not in the name of the partnership, apply for the benefit of the insolvent law of the state.[43] A few cases hold that if the emergency is such that there is a crisis in the affairs of the business, and the other partner can not be reached in time to meet the conditions, then the one partner may make an assignment.[44] It seems that such an assignment is not necessary to secure the property from sacrifice or protect the rights of all creditors, since one partner in an insolvent firm has power to institute bankruptcy proceedings,[45] or insolvency proceedings,[46] or may sue in equity for a dissolution and distribution of assets.[47] The insanity,[48] sickness,[49] or temporary absence,[50] of one partner gives the other no power to make such an assignment.[51] In some cases a managing partner is held to have power to make an assignment where the others are nonresidents. If the assigning partner sets up that the assignment was made with the consent of his partners, or that the partners were absent from the country, the burden of proof is upon him to establish such facts.[51a] The authority to make such an assignment may be expressly given to one partner by his copartners, or it may be implied from the acts of the partners, or the general conditions of the partnership. It is generally held that the nonassigning partners

Watts (Pa.) 22, 30 Am. Dec. 287; Blum v. Bratton, 2 Tex. Civ. App. 226, 21 S. W. 65; Voshmik v. Urquhart, 91 Wis. 513, 65 N. W. 60.

[43] Second Nat. Bank v. Willing, 66 Md. 314, 7 Atl. 558.

[44] Trumbull v. Union Trust Co., 33 Ill. App. 319. But see Stein v. La Dow, 13 Minn. 412; Mayer v. Bernstein, 69 Miss. 17, 12 So. 257; Welles v. March, 30 N. Y. 344; In re Daniels, 14 R. I. 500.

[45] Pleasants v. Meng, 1 Dall. (Pa.) 380, 1 L. ed. 185.

[46] Durgin v. Coolidge, 3 Allen (Mass.) 554.

[47] Holmes v. McDowell, 15 Hun (N. Y.) 585.

[48] Friedburgher v. Jaberg, 20 Abb. N. Cas. 279, 11 N. Y. St. 718.

[49] Stadelman v. Loehr, 47 Hun 327, 14 N. Y. St. 247.

[50] Stockham v. Wells, 25 Wkly. Notes Cas. (Pa.) 84.

[51] Williams v. Frost, 27 Minn. 255, 6 N. W. 793; H. B. Clafflin Co. v. Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. 686.

[51a] Shattuck v. Chandler, 40 Kans. 516, 20 Pac. 225, 10 Am. St. 227.

may ratify the assignment made by one or more of the partners, even after the assignment.[51b] A few cases hold to the contrary rule. In Montana[52] it is held that an assignment for the benefit of creditors is so important and solemn an act that public policy requires that the authority be given in advance, and under such circumstances that no question can arise as to it. A Texas case[53] goes so far as to hold that declarations to the effect that authority to assign had been given, made by the signing partner when he executed the assignment and by the other partner when he ratified it, are not competent evidence. Most, if not all jurisdictions, however, agree that if any liens intervene between the assignment and the attempted ratification, the ratification can not relate back so as to interfere with the intervening liens.[54]

§ 459. Power to submit to arbitration.—Upon the question of the power of one partner to bind the firm by a submission to arbitration, the various courts are divided, some holding the submission valid as to the firm, and more holding the contrary doctrine. In most jurisdictions it is held that one partner may not bind the others by submitting partnership matters to arbitration,[55] for such is no part of the regular business of an

[51b] Pearpoint v. Graham, 4 Wash. (U. S.) 232; Dunklin v. Kimball, 50 Ala. 251; Corbett v. Cannon, 57 Kans. 127, 45 Pac. 80; Ely v. Hair, 16 B. Mon. (Ky.) 230; Kirby v. Ingersoll, 1 Doug. (Mich.) 477, Harr. 172; Adee v. Cornell, 93 N. Y. 572; Sheldon v. Smith, 28 Barb. (N. Y.) 593; Holland v. Drake, 29 Ohio St. 441; Hodenpyl v. Hines, 160 Pa. St. 466, 28 Atl. 825; McNutt v. Strayhorn, 39 Pa. St. 269; Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 37 Am. Dec. 253.

[52] Steinhart v. Fyhrie, 5 Mont. 463, 6 Pac. 367.

[53] Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69.

[54] Trumbull v. Union Trust Co., 33 Ill. App. 319; Mills v. Miller, 109 Iowa 688, 81 N. W. 169; Stein v. La Dow, 13 Minn. 412; Steinhart v. Fyhrie, 5 Mont. 463, 6 Pac. 367; Holland v. Drake, 29 Ohio St. 441; Mayer v. Bernstein, 69 Miss. 17, 12 So. 257; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

[55] Karthaus v. Yilas y Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121. See also Fancher v. Bibb Furnace Co., 80 Ala. 481, 2 So. 268; Jones v. Bailey, 5 Cal. 345; Horton v. Wilde, 8 Gray (Mass.) 425; Davis v. Berger, 54 Mich. 562, 20 N. W. 629; Walker v. Bean, 34 Minn. 427, 26 N. W. 232; Hoffman v. Westlecraft, 85 N. J. L. 484, 89 Atl. 1006; Harrington v.

ordinary copartnership, nor can a majority bind the other partners.[56] Under the Uniform Partnership Act one partner may not submit a partnership claim or liability to arbitration or reference.[57] In some jurisdictions, however, it is held that one partner has implied power to submit on behalf of the partnership.[58] Some of the conflicting decisions turn upon whether or not such submission must be under seal, and these decisions hold that where a seal is necessary the power is not implied in a partner.[59] On the contrary, if there is, under the laws of any particular state, nothing requiring such agreement to be under seal, it is held that such a power is within the scope of a partner's authority, and valid at least in some jurisdictions.[60] Even the above distinction is not of universal application, it having been held in some jurisdictions that there is no implied power of a partner to bind his copartners by submission to arbitration, regardless of the question of seal or lack of seal, basing their opinion upon the statement that the exigencies and conveniences of business do not require a partner to possess such a power.[61]

§ 460. Submission to arbitration by consent.—It should be kept in mind that the foregoing applies simply to the implied

Higham, 13 Barb. (N. Y.) 660, 15 Barb. (N. Y.) 524; Tillinghast v. Gilmore, 17 R. I. 413, 22 Atl. 942; St. Martin v. Thrasher, 40 Vt. 460; Wood v. Shepherd, 2 Pat. & H. (Va.) 442. And see Stead v. Salt, 3 Bing. 101, 11 E. C. L. 58; Woody v. Pickard, 8 Blackf. (Ind.) 55; Eastman v. Burleigh, 2 N. H. 484; Steiglitz v. Egginton, Holt N. P. 141, 3 E. C. L. 63; French v. Weir, 17 U. C. Q. B. 245.

[56] Stead v. Salt, 3 Bing. 101, 11 E. C. L. 58.

[57] Uniform Partnership Act, § 9 (3) (e).

[58] Hallack v. March, 25 Ill. 48; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Wilcox v. Singletary, Wright (Ohio) 420; Gay v. Waltman, 89 Pa. St. 453; Alexander v. Mulhall, 1 Tex. Unrep. Cas. 764.

[59] Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121; Barlow v. Reno, 1 Blackf. (Ind.) 252; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Buchoz v. Grandjean, 1 Mich. 367; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Wood v. Shepherd, 2 Pat. & H. (Va.) 442.

[60] Hallack v. Marsh, 25 Ill. 48; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Wilcox v. Singletary, Wright (Ohio) 420; Gay v. Waltman, 89 Pa. St. 453.

[61] Harrington v. Higham, 13 Barb. (N. Y.) 660; St. Martin v. Thrasher,

right of a partner to submit firm matters to arbitration, and does not apply to cases where actual authority is given by the other partners, in which case, as in other proper and legal matters, such authority may be given, and any distinct expression of this intent, by the other copartners, is sufficient authorization.[62] The question naturally arises as to whether or not the power to conduct a suit includes the power of reference to arbitration. In the United States the question is answered as a rule, in the affirmative, at least in a limited manner.[63] This is probably based upon the theory that where a person commences a suit, one of the possibilities is that circumstances may be such that it may be advantageous to refer it to arbitration, and that, consequently, this possibility was in the mind of the partner giving the power to conduct the suit, as a necessary part of the full power of conducting the suit.

In England, however, the rule is not in accord with the general American doctrine, and it has there been held that where one member of a dissolving partnership authorized the other member to collect the assets and sue in their joint names, there is no resulting authority to submit to arbitration a suit brought under this authority.[64]

§ 461. **Ratification of submission.**—The lack of actual authority of a partner to submit to arbitration may, in general, be remedied by the others by ratification of the unauthorized submission.[65] A distinction has been made, however, upon the question of whether the attempted ratification was made before

40 Vt. 460; Stead v. Salt, 3 Bing. 101; Morley v. Boothby, 10 Moore 395.

[62] Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121; Davis v. Berger, 54 Mich. 652, 20 N. W. 629; McBride v. Hagan, 1 Wend. (N. Y.) 326; McKay v. Bloodgood, 9 Johns. (N. Y.) 285; Wilcox v. Singletary, Wright (Ohio) 420; Adams v. Bankart, 1 C. M. & R. 681.

[63] Morse Arbitration and Award, § 10.

[64] Hatton v. Royle, 3 H. & N. 500; Russell Arbitration, § 20.

[65] Hallack v. March, 25 Ill. 48; Abbott v. Dexter, 6 Cush. (Mass.) 108; Hamilton v. Phoenix Ins. Co., 106 Mass. 395; Davis v. Berger, 54 Mich. 652, 20 N. W. 629; McArthur v. Oliver, 53 Mich. 299, 305, 19 N. W. 5; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; St. Martin v. Thrasher, 40 Vt. 460; Baby v. Davenport, 3 U. C. Q. B. 54.

or after the award was made. The point is well illustrated by a New Hampshire case,[66] which lays down the principle that where a party, not bound by his partner's unauthorized submission to arbitration, does not ratify before the award has been made, and so make himself liable thereto if it be against him, he can not, after an award has been made in his favor, by ratification take advantage of it. In case one partner submits to arbitration in behalf of himself and the firm and by reason of lack of either implied or actual authority, or of proper ratification has not the power to bind the other members within the partnership, he is nevertheless individually bound by the award,[67] though the other partners repudiate the submission.[68] Ratification, as well as assent in advance, may be either express or implied, and all the circumstances must be considered by the jury in arriving at a conclusion,[69] but there can be no ratification unless the partner claimed to have ratified did so with a full knowledge of the unauthorized act.[70] And the ratification, whether express or implied, must be definite. In a Texas case[71] the innocent partner promised the creditor to pay, provided he could secure sufficient evidence of ratification, and the court held that this was not sufficient.

[66] Eastman v. Burleigh, 2 N. H. 484. See also McKay v. Bloodgood, 9 Johns. (N. Y.) 285; Tillinghast v. Gilmore, 17 R. I. 413, 22 Atl. 942.

[67] Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121; Jones v. Bailey, 5 Cal. 345; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; McBride v. Hagen, 1 Wend. (N. Y.) 326; Brink v. New Amsterdam F. Ins. Co., 5 Rob. (N. Y.) 104; Harrington v. Higham, 13 Barb. (N. Y.) 660; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Strangford v. Green, 2 Mod. 228.

[68] Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121. See also Strangford v. Green, 2 Mod. 228; Jones v. Bailey, 5 Cal. 345; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Harrington v. Higham, 13 Barb. (N. Y.) 660; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Runyon v. Rutherford, 55 W. Va. 436, 47 S. E. 150.

[69] Ellis v. Allen, 80 Ala. 515, 2 So. 676.

[70] Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122; Gray v. Ward, 18 Ill. 32; Hotchin v. Kent, 8 Mich. 526; Andrews v. Planters' Bank, 7 Smed. & M. (Miss.) 192, 45 Am. Dec. 300; Norton v. Thatcher, 8 Nebr. 186; Hull v. Young, 30 S. Car. 121; Biggs v. Hubert, 14 S. Car. 620.

[71] Burleigh v. Parton, 21 Tex. 585.

§ 462. **What constitutes arbitration.**—Arbitration consists in the submitting, by two or more parties, of matters in dispute between them, to another party, for a decision by him upon the question in dispute. The party deciding must do so, however, acting, as it were, in a judicial capacity, and not in a clerical or ministerial manner, and if the person acting for them is simply an accountant, who adjusts their accounts from their books, and thus arrives at a conclusion as to the balances between them, this is not arbitration,[72] nor is it such where one partner, in purchasing anything which must be weighed, counted or measured, agrees to adopt the figures of a person who is selected to so weigh, count or measure the articles purchased.[73]

§ 463. **Power over partnership real estate.**—The powers of a partner as to partnership real estate have been included in the discussion of various particular powers, such as to purchase or sell firm property, to mortgage firm property, to make leases, to make assignments for benefit of creditors, all of which subjects should be seen. The conveyance of partnership property is treated in the chapter on partnership property. A partner may convey his interest in partnership real estate, but this will be treated later in the chapter on change of membership.

§ 464. **Rights and powers of dormant partner as to contracts.**—A dormant partner has certain rights in the making of firm contracts as against copartners and creditors. He may insist that the firm shall not be bound on liability known by the other party to be for the benefit of an individual partner.[74] He

[72] Stage v. Gorich, 107 Ill. 361.

[73] Perkins v. Hoyt, 35 Mich. 506. An agreement to arbitrate a dispute as to the interest of a deceased partner in a firm entered into between his widow and surviving partner can not be repudiated by the latter because it does not bind the deceased's minor children since the minor's contract is avoidable only at the minor's option. In an action on an alleged award made by arbitrator, defendant can not, under an answer denying the agreement to arbitrate, show that the arbitration was void because of the party interested being a minor. Chambers v. Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118.

[74] In re Munn, 3 Biss. (U. S.) 442, Fed. Cas. 9925; Miller v. Manice,

can revoke the implied power of his copartners to bind him by their contracts.[75] He can also refuse to be charged on a firm obligation, unless it is shown that the firm was benefited by the transaction or gave its credit for the obligation.[76]

§ 465. Acts creating individual liability.—It has been seen that a contract by one partner though without the scope of the firm business and without the consent of copartners may sometimes bind the partner making the contract individually.[77] The assumption by the firm of the liability of partners for their individual debts does not discharge the partner individually.[78] And a partner individually joining the firm in making a note is individually and primarily liable on it.[79] And one partner who contracts for the purchase of goods on his own credit without reference to the firm is liable for them individually,[80] and one who sells to a partner on his individual account, not intending to look to the firm for payment, can not hold the copartners, even if the goods were used in the firm business.[81] So where one partner only signs a lease containing allegations of partnership, action on the covenants may be maintained against him alone.[82] But where one rendered services to a company, which one partner misrepresented to be a corporation, he can recover from the

6 Hill (N. Y.) 114; Bank of Pennsylvania v. Hadfeg, 3 Yeates (Pa.) 560.

[75] Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157.

[76] Palmer v. Elliott, 1 Cliff. (U. S.) 63, Fed. Cas. No. 10690; Alexandria Bank v. Mandeville, 1 Cranch (U. S.) 575, Fed. Cas. No. 851; Fosdick v. Van Horn, 40 Ohio St. 459.

[77] Jones v. Bailey, 5 Cal. 345; Cooke v. Allison, 30 La. Ann. 963; Taft v. Church, 162 Mass. 527, 39 N. E. 283; Harrington v. Higham, 15 Barb. (N. Y.) 524; In re York Bank's Appeal, 36 Pa. St. 458; Wood v. Shepherd, 2 Pat. & H. (Va.) 442.

[78] The Swallow, Olcott (U. S.) 334, Fed. Cas. No. 13665.

[79] Orman v. Potter, 46 Colo. 54, 102 Pac. 893; Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917; Bell v. Ottawa Trust &c. Co., 28 Ont. 519.

[80] Brown v. Brown (Tex. Civ. App,), 155 S. W. 551.

[81] George Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944.

[82] Springer v. Simpson, 175 Ill. App. 631.

one partner personally only by showing reliance on his representations.[83]

§ 466. Admissions and representations by partner.—Ordinarily the law will, where the evidence establishes the existence of a partnership, regard in general as binding upon the latter any admission or representation made by an individual member of the firm about partnership matters and in the due course thereof.[84] By the Uniform Partnership Act: "An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership."[85] Thus the receipt by one of the members of the partnership engaged in distilling and in the purchase of corn, by which he acknowledges the delivery

[83] Gettins v. Hennessey, 60 Ore. 566, 120 Pac. 369.

[84] Swofford Bros. Dry Goods Co. v. Mills, 86 Fed. 556; In re Many, 17 Nat. Bankr. Reg. 514, Fed. Cas. No. 9054; Croswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Hogan v. Reynolds, 8 Ala. 59; Talbot v. Wilkins, 31 Ark. 411; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; Munson v. Wickwire, 21 Conn. 513; Lanier v. Chappell, 2 Fla. 621; Lewis v. Allen, 17 Ga. 300; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; Wanner v. Winters, 33 Ill. App. 149; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Waite v. High, 96 Iowa 742, 65 N. W. 397; Wiley v. Griswold, 41 Iowa 375; Bemis v. Becker, 1 Kans. 226; Sneed v. Kelly's Exr., 3 Dana (Ky.) 538; Byrne v. Hooper, 2 Rob. (La.) 229; Fickett v. Swift, 41 Maine 65, 66 Am. Dec. 214; Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Cook v. Castner, 9 Cush. (Mass.) 266; Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Milwaukee Harvester Co. v. Finnegan, 43 Minn. 183, 45 N. W. 9; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Faler v. Jordan, 44 Miss. 283; Henslee v. Cannefax, 49 Mo. 295; Caris v. Nimmons, 92 Mo. App. 66; Gulick v. Gulick, 14 N. J. L. 578; Hoboken Sav. Bank v. Beckman, 36 N. J. Eq. 83; Sweet v. Bradley, 24 Barb. (N. Y.) 549; Comstock v. Warner, 2 Thomp. & C. (N. Y.) 663; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; McKee v. Hamilton, 33 Ohio St. 7; Frick v. Reynolds, 6 Okla. 638, 52 Pac. 391; North Pacific Lumber Co. v. Spore, 44 Ore. 462, 75 Pac. 890; Crawford v. Willing, 4 Dall. (Pa.) 286, 1 L. ed. 836; Gavin v. Walker, 14 Lea (Tenn.) 643; Fergusson v. Fyffe, 8 Cl. & F. 121. See English Partnership Act (1890), § 15. And compare Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Kaiser v. Fendrick, 98 Pa. St. 528; Hetterman Bros. Co. v. Young (Tenn.), 52 S. W. 532; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976.

[85] Uniform Partnership Act, § 11.

of a specific quantity of corn to him by a certain person, may be introduced in evidence by the latter in an action by him against the firm.[86] So also it has been held that a partner will be bound by the representations of his copartner that the money, which he procures by loan on the credit of the firm and on the faith of the partnership business, is desired for partnership purposes.[87] But generally, in accordance with the law of agency, admissions by a partner are not competent to prove a partnership, or that a certain particular transaction was a partnership transaction.[88] "The authority of a partner to act on behalf of the firm is based upon the general principles regulating the authority of agents; and it is a primary principle that the authority of an agent can not be proved by the declarations of the agent himself."[89] So it has been held that a partner can not bind his associates by admissions as to the scope of the partnership business, not made at the time of the execution of the contract in suit.[90] Again "one partner can not by his acts or declarations, in the absence of the others, deprive them or either of them of their interest in the firm property."[91] So also it has been said by no less a person than Justice Cooley himself that "a partner's declarations may bind his associates in partnership matters, but not in concerns foreign to the partnership; and he can not by his mere admission or declaration bring a transaction within the scope of the business when upon the facts in proof it appears to

[86] Bisel v. Hobbs, 6 Blackf. (Ind.) 479.

[87] Gavin v. Walker, 14 Lea (Tenn.) 643. See also Deitz v. Regnier, 27 Kans. 94.

[88] Hahn v. St. Clair Sav. & Ins. Co., 50 Ill. 456; Taft v. Church, 162 Mass. 527, 39 N. E. 283; Tuttle v. Cooper, 5 Pick. (Mass.) 414; Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[89] Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 N. W. 165. See also Ex parte Agace, 2 Cox Ch. 312; Rush v. Thompson, 112 Ind. 158, 13 N. E. 665; Thomas v. Harding, 8 Greenl. (Maine) 417; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Heffron v. Hanaford, 40 Mich. 305; Freeman v. Bloomfield, 43 Mo. 391; Rumsey v. Briggs, 63 Hun 11, 17 N. Y. S. 562, 44 N. Y. St. 38; Kittel v. Callahan, 19 N. Y. S. 397, 46 N. Y. St. 404.

[90] Taft v. Church, 162 Mass. 527, 39 N. E. 283. See also in this connection, Shellito v. Sampson, 61 Iowa 40, 15 N. W. 572.

[91] Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403.

have no connection."[92] So also, in an action against partners on a promissory note executed by one of them in the name of the firm, it has been held that admissions by him are not admissible to prove the note a partnership obligation.[93] But a declaration by a partner outside the scope of his agency may be binding on his copartners if authorized or ratified,[94] or they may be estopped to deny liability.[95]

§ 467. Admissions made after dissolution.—The general rule is that admissions made by one partner after the dissolution of the partnership relating to the business of the firm, are not binding on the other partners, and hence may not be admitted in evidence against them.[96] The reason for the rule has thus been stated:[97] "The admission of one partner, of a debt of the partnership made when the partnership has no existence,

[92] Heffron v. Hanaford, 40 Mich. 305. See Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69. See also Edgell v. MacQueen, 8 Mo. App. 71; Rumsey v. Briggs, 63 Hun 11, 17 N. Y. S. 562, 44 N. Y. St. 38; Taylor v. Thompson, 62 App. Div. 159, 70 N. Y. S. 997; Folk v. Schaeffer, 180 Pa. St. 613, 37 Atl. 104.

[93] Tuttle v. Cooper, 5 Pick. (Mass.) 414.

[94] Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818; Nixon v. Jenkins, 1 Hilt. (N. Y.) 318.

[95] Bemis v. Becker, 1 Kans. 226; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Blair v. Bromley, 2 Phillips 354.

[96] Thompson v. Bournan, 6 Wall. (U. S.) 316, 18 L. ed. 736; Burns v. McKenzie, 23 Cal. 101; Hitt v. Allen, 13 Ill. 592; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Taylor v. Hillyer, 3 Blackf. (Ind.) 433, 26 Am. Dec. 430; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Clarke v. Jones, 1 Rob. (La.) 78; Herrick v. Conant, 4 La. Ann. 276; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Hurst v. Hill, 8 Md. 399, 63 Am. Dec. 705; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Shakopee First Nat. Bank v. Strait, 65 Minn. 162, 67 N. W. 987; Maxey v. Strong, 53 Miss. 280; Dowzelot v. Rawlings, 58 Mo. 75; Brady v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Pringle v. Leverick, 97 N. Y. 181, 49 Am. Rep. 522; Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Tassey v. Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65; Moore v. Palmer, 132 N. Car. 969, 44 S. E. 673; Crumless v. Sturgess, 6 Heisk. (Tenn.) 190; Hunter v. Hubbard, 26 Tex. 537; Burdett v. Greer, 63 W. Va. 515, 15 Ann. Cas. 935. See also Brewster v. Hardeman, Dud. (Ga.) 38; Southwick v. McGovern, 28 Iowa 533.

[97] Miller v. Neimerick, 19 Ill. 172.

if sufficient to establish the liability of all the partners, involves the power to bind all by the creation of a partnership liability; for it is indifferent to the other partners whether their liability be established by the admission or the undertaking, written or verbal, of one of their number. The effect in either case is the same. A joint liability is prima facie established and imposed, which may be satisfied not only out of the partnership property, but out of the separate estates of the former partners. If the several members of a dissolved firm can, by admission or stipulation, charge their former partners, not only may the partnership assets be swallowed up, but the individual members of the late firm may be made bankrupt, by admissions made after the partnership has ceased to exist, by one no longer their agent,—without the sanctions of an oath or any of the ordinary guaranties of truth, and who may be without pecuniary ability to respond in damages, is influenced by ill will or private gain, and has in fact no real concern as to consequences of mere legal liability." In the application of this principle, it has been held that admissions of a partner after dissolution would not bind the other partners as to a balance due from the firm,[98] the protest of a draft, a new contract,[99] or the existence of a partnership where a contract was executed.[1] In some cases it is held that if the party to whom the admission is made does not know of the dissolution, all partners are held.[2] There is very respectable authority to the effect that the admissions of partners after dissolution as to past partnership transactions are binding on all the partners and admissible in evidence.[3] As to the reason for

[98] Miller v. Neimerick, 19 Ill. 172.

[99] Yandes v. Lefavour, 2 Blackf. (Ind.) 371.

[1] Barringer v. Smeed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74.

[2] Price v. Towsey, 3 Litt. (Ky.) 423, 14 Am. Dec. 81; Spears v. Toland, 1 A. K. Marsh. (Ky.) 203, 10 Am. Dec. 722; Southwick v. McGovern, 28 Iowa 533. Contra: Pringle v. Leverick, 97 N. Y. 181, 49 Am. Rep. 522.

[3] Munson v. Wickwire, 21 Conn. 513; Hinkley v. Gilligan, 34 Maine 101; Bridge v. Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Pennoyer v. David, 8 Mich. 407; Rich v. Flanders, 39 N. H. 304; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Woodworth v.

this rule it has been said:[4] "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation, but the power of partners with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved, his account of their joint contracts should cease to be evidence, and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?" Under this rule there have been held binding on all partners admissions made after dissolution by one partner as to a balance due the firm,[5] or a payment to one partner for the firm made after dissolution,[6] but not to show that a partnership formerly existed.[7] It has been held that admissions made by a partner after his discharge in bankruptcy may bind other partners,[8] but also it is held that the admissions of a partner discharged in bankruptcy do bind his copartners.[9] In South Carolina admissions made by one partner after dissolution are not sufficient to establish the existence of a partnership or of a partnership debt, but when these have been shown otherwise, such admissions may be received to bind the other partners.[10]

§ 468. Admissions after dissolution as taking firm debt out of statute of limitations.—The cases are not in harmony as the effect of admissions of a partner after dissolution to remove the defense of the statute of limitations. It seems gen-

Downer, 13 Vt. 522, 37 Am. Dec. 611; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Burton v. Issit, 5 B. & Ald. 267; Fisher v. Russell, 2 L. C. Jur. (Can.) 191.

[4] Mansfield, C. J., in Wood v. Braddick, 1 Taunt. 104.

[5] Wood v. Braddick, 1 Taunt. 104.

[6] Pritchard v. Draper, 1 Russ. & M. (Eng.) 191.

[7] Robbins v. Willard, 6 Pick. (Mass.) 464.

[8] Martin v. Root, 17 Mass. 222.

[9] Grant v. Jackson, Peake N. P. 204; Parker v. Morrell, 2 C. & K. 599.

[10] Fripp v. Williams, 14 S. Car. 502; Meggett v. Finney, 4 Strob. (S. Car.) 220.

erally to be held that the statute of limitations extinguishes a debt, so that a new promise is necessary in order to revive it, and after a debt is thus barred by the statute, a partner after dissolution has no more right to revive it and make his former copartners liable than he would have to create a new debt and bind them.[11] Some cases, presumably on the theory that the statute of limitations does not extinguish the debt, but merely bars the remedy, allow the admission of one partner after dissolution, to raise the bar of the statute as to his copartners.[12] The same conflict exists as to whether a part payment on a firm debt by one partner, after dissolution, but before the statute has taken effect, will prolong the running of the statute of limitations as to his partners. Most cases hold that it will not.[13] But some cases hold that such payment after dissolution is for the benefit of all partners and therefore the running of the statute of limitations is postponed as to all.[14] A creditor having no notice of dissolution may rely on a payment by or promise of a partner as postponing the running of the statute of limitations.[15]

§ 469. Notice to partner.—A partnership will be bound by notice received in good faith by an acting partner as to any matter regarding a transaction within the ordinary scope of its

[11] Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Lang's Heirs v. Waring, 17 Ala. 145; Newman v. McComas, 43 Md. 70; Mayberry v. Willoughby, 5 Nebr. 368, 25 Am. Rep. 491; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656; Reppert v. Colvin, 48 Pa. St. 248; Lodge v. Ainscow, 1 Pennew. (Del.) 327, 41 Atl. 187; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; McCahan v. Smith, 9 Pa. Super. Ct. 318.

[12] Day v. Merritt, 38 N. J. L. 32, 20 Am. Rep. 362; Wheelock v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163; Whitcomb v. Whiting, 2 Doug. 628. See also In re Leeds & Co., 49 La. Ann. 501, 21 So. 617.

[13] Curry v. White, 51 Cal. 530; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Tappan v. Kimball, 30 N. H. 136; Wilson v. Waugh, 101 Pa. St. 233; Haddock v. Crocheron, 32 Tex. 276, 5 Am. Rep. 244.

[14] Burr v. Williams, 20 Ark. 171; Bissell v. Adams, 35 Conn. 299; Van Staden v. Kline, 64 Iowa 180, 20 N. W. 3; McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378; Whitcomb v. Whiting, 2 Doug. 628.

[15] Sage v. Ensign, 2 Allen (Mass.) 245; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Forbes v. Garfield, 32 Hun (N. Y.) 389; Clement v. Clem-

business.[16] The Uniform Partnership Act expresses the general rule thus: "Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."[17] Thus, where the drawer and acceptor of a bill are partners, notice of the dishonor of the

ent, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760. Contra: Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709.

[16] "This court in its opinion held that notice to one partner was notice to the other of any transaction occurring after the partnership was formed, which is a correct rule of law." Miller v. Jones, 33 Ky. L. 848, 111 S. W. 295 (overruling on another point, Miller v. Jones, 32 Ky. L. 1078, 107 S. W. 783). See further Williamson v. Barbour, 9 Ch. Div. 529; Overall v. Taylor, 99 Ala. 12, 11 So. 738; Burritt v. Dickson, 8 Cal. 113; Cochran v. Hume, 8 Mackey (D. C.) 517; Baskins v. Valdosta Bank & Trust Co., 5 Ga. App. 600, 63 S. E. 648; Middleton Sav. Bank v. Dubuque, 19 Iowa 467; Wright v. Railey, 13 La. Ann. 536; King v. Remington, 36 Minn. 15, 29 N. W. 352; Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512; Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916; King v. National Oil Co., 81 Mo. App. 55; Drake v. White Sew. Mach. Co., 133 App. Div. 446, 118 N. Y. S. 178; Ross v. Whitefield, 31 N. Y. Super. Ct. 318, 36 N. Y. Super. Ct. 50; Riddle v. Canby, 2 Ohio Dec. 586; Thompson v. Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236, 27 Wkly. Notes Cas. 87; McClurkan v. Byers, 74 Pa. St. 405; Flynn v. Bank of Mineral Wells, 53 Tex. Civ. App. 481, 118 S. W. 848; Barney v. Currier, 1 D. Chip. (Vt.) 315, 6 Am. Dec. 739; Loosen v. Schissler, 149 Wis. 449, 135 N. W. 1008; Sadler v. Lee, 6 Beav. 324, 7 Jur. 476. But compare with this case Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Parrish v. Adwell (Tex. Civ. App.), 124 S. W. 441; Texas Cent. R. Co. v. Pool, 52 Tex. Civ. App. 307, 114 S. W. 685; Loosen v. Schissler, 149 Wis. 449, 135 N. W. 1008; Tomlinson v. Broadsmith (1896), 1 Q. B. 386; Driffill v. Goodwin, 23 Grant Ch. (U. C.) 431. See also Lacey v. Hill, 4 Ch. Div. 537; Townsend v. Hagar, 72 Fed. 949, 19 C. C. A. 256; Watson v. Wells, 5 Conn. 468; Gedge v. Cromwell, 19 App. D. C. 192; Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043; Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070; Hays v. Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573, 19 Ky. L. 367; Adams Oil Co. v. Christmas, 101 Ky. 564, 41 S. W. 545, 19 Ky. L. 760; Howland v. Davis, 40 Mich. 545; Fitch v. Stamps, 6 How. (Miss.) 487; Parlin, Orendorff Co. v. Glover, 55 Tex. Civ. App. 112, 118 S. W. 731.

[17] Uniform Partnership Act, § 12.

paper given to the drawer will be sufficient.[18] So upon the question of protest and notice in the case of a partnership, it has been held that such notice is properly left at the residence of one of the partners or at the firm's place of business with some one there in charge.[19] Likewise it has been held that if a bank holds a foreign bill and has notice of its nonpayment, the fact that its cashier is one of the members of the firm which drew and indorsed the paper renders protest of such bill unnecessary to charge the partners.[20] So, also, the members of a partnership will be jointly liable when, as mortgagees they have failed to meet the statutory requirement of entry of satisfaction of the mortgage although the notice or request has been given or made to one of their number only.[21] Again when one partner buys for the benefit of the firm in fraud of the vendor's creditors, notice of the fraud has been imputed to the purchaser's associate.[22] In like manner where one partner purchases timber in behalf of the firm, his associates will be charged with his knowledge that the timber was cut from land which was not the property of the seller, to the extent at least that all will be liable for the statutory damages.[23] So, also, a banking partnership will be charged with the knowledge of one of its members as to the facts having to do with the issuance of a note held by the firm.[24] Again, the statement of the payor that his note is still unpaid does not relieve the partner to whom such declaration is made from knowledge that the note has in reality been paid to his copartner, the latter being fully authorized to receive payment.[25] Further, an early case is authority for the proposition that where

[18] Rhett v. Poe, 2 How. (U. S.) 457, 11 L. ed. 338. See also Collins v. Titusville Bank, 1 Walk. (Pa.) 194. See § 439, on power as to presentment and protest.

[19] Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858.

[20] Hays v. Citizens' Sav. Bank, 101 Ky. 201, 19 Ky. L. 367, 40 S. W. 573.

[21] Johnson v. Frix, 177 Ala. 251, 58 So. 427; Renfro v. Adams, 62 Ala. 302.

[22] Patterson v. Seaton, 70 Iowa 689, 28 N. W. 598. But compare Jones v. Draper, 26 Ohio C. C. 785.

[23] Tucker v. Cole, 54 Wis. 539, 11 N. W. 703.

[24] Adams v. Ashman, 203 Pa. St. 536, 53 Atl. 375.

[25] Bigelow v. Henniger, 33 Kans. 362, 6 Pac. 593.

one of the members of a mercantile firm against which suit has been brought is served with notice of the taking of depositions, his knowledge will be imputed to his copartner who lives in another state and this notwithstanding the fact that dissolution of the partnership precedes the time of trial.[26] This imputation to all the members of the firm of notice given to one of the partners is not apparently restricted to cases where the personnel of the firm remains the same after the consummation of the transaction involved, as it was at the time when the same took place. In other words, it seems that where a person becomes a member of the partnership after one of its members has received notice of a certain fact, he will be charged with the same in like manner as if he had entered the firm before the knowledge was actually obtained.[27] Notice to one member of a firm, which took a mortgage on land, that there was a prior mortgage is notice to the firm.[28] "The rule of law which attaches a responsibility to the status of a partnership relation for the acts of a copartner within the scope of business transactions is founded upon a just view of the requirements of public commercial interests. To extend its operation to the extent of imputing the notice or knowledge of one copartner, acquired in transactions outside of the partnership business, and which were had for his individual benefit, to the other, would be to convert the rule into an instrumentality of injustice."[29] Moreover, one partner individually acting as trustee under a deed of trust will not be held to have the knowledge of his copartner concerning such trust.[30] Again an agent who deals with a partner without disclosing his

[26] Gilly v. Singleton, 3 Litt. (Ky.) 249.

[27] Middleton Sav. Bank v. Dubuque, 19 Iowa 467; Herbert v. Odlin, 40 N. H. 267; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471.

[28] Watson v. Wells, 5 Conn. 468.

[29] Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321. See further Flynn v. Bank of Mineral Wells, 53 Tex. Civ. App. 481, 118 S. W. 848; German Sav. Bank v. Wulfekuhler, 19 Kans. 60; Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036; Van Bergen v. Lehmaier, 72 Hun 304, 25 N. Y. S. 356, 55 N. Y. St. 532; Atlantic State Bank of Brooklyn v. Savery, 82 N. Y. 291.

[30] Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

agency can not escape personal liability through the simple fact that the copartner who did not even know of the particular transaction had on another occasion been informed that the one who subsequently contracted with his associate bore the relation of agent to a certain individual.[31] Furthermore, a partner may not be charged with knowledge of the act of his copartner when the latter has been guilty of a fraudulent concealment of the same.[32] Nor are the other partners bound by notice to a partner who is perpetrating a fraud on them.[33] And knowledge of a partner executing a note and mortgage in the firm name has been held not notice to a copartner and other persons who purchased the partner's interest.[34] A demand upon one partner upon a claim or matter arising within the scope of the firm business is a demand binding on all the partners.[35] Waiver of tender by one partner will bind the firm.[36]

§ 470. Notice of authority of partner as affecting rights of third parties.—As was stated in a preceding section, a third person dealing with the firm is not bound by secret restrictions not known to him on the ordinary authority of a partner as general agent for the firm in its business,[37] and it has been held that one dealing with a partner is chargeable with notice of what acts are within the ordinary scope of the firm business which it is held out as conducting, and must be held to notice of lack of authority in a partner to hurt the firm by acts without such

[31] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[32] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191.

[33] Gilruth v. Decell, 72 Miss. 232, 16 So. 250; Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321; Jones v. Draper, 26 Ohio Cir. Ct. 785.

[34] Hawkins v. Western Nat. Bank of Hereford (Tex. Civ. App.), 146 S. W. 1191.

[35] Miller v. Phenix Ins. Co., 109 Ill. App. 624 (to pay money); La Crosse Milling Co. v. Williams, 2 Kans. App. 160, 43 Pac. 288 (in replevin); Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207 (on note); Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607 (in action for conversion); Nisbet v. Patton, 4 Rawle (Pa.) 120, 26 Am. Dec. 122.

[36] Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512.

[37] See § 418, on restrictions of authority. Bass Dry Goods Co. v. Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

scope.[38] Thus, one must take notice of the lack of power of one partner to bind his firm by a pledge of partnership tobacco to secure payment of advances made to buy tobacco in the name of another firm of which he was a member.[39] Where the partnership does business in the name of "Taylor Coal Co," one dealing with it is put on inquiry as to who are its members, and if he keep firm property from "Taylor" without the knowledge or consent of the other partner, he does so at his peril.[40] What facts are sufficient to put the holder of negotiable paper made or indorsed in a firm name, on inquiry, have been discussed.[41] But merely the taking by a bank of an order to pay firm money to secure a partner's individual debt and applying the proceeds to the debt has been held not enough to put the bank on inquiry as to whether the partner had authority from his copartner.[42]

§ 471. **Ratification of acts of partner.**—It has been seen in preceding sections on particular powers that where an unauthorized contract on behalf of the firm has been entered into by one of the partners, the firm's liability thereon may ordinarily be established by a subsequent ratification thereof, and this is equivalent to antecedent authority.[43] To establish such rati-

[38] Standard Wagon Co. v. Few, 119 Ga. 293, 46 S. E. 109; Victoria Lumber Co. v. Montgomery, 130 La. 120, 57 So. 650; Peterson v. Armstrong, 24 Utah 96, 66 Pac. 767.

[39] Brooks-Waterfield Co. v. Carpenter, 21 Ky. L. 851, 53 S. W. 40.

[40] Plimpton v. Taylor, 21 Ohio Cir. Ct. 260, 11 Ohio C. D. 570.

[41] See ante § 432.

[42] Breeze v. International Banking Corporation, 25 Cal. App. 437, 143 Pac. 1066.

[43] McGahan v. National Bank, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347; United States v. Turner, 2 Bond (U. S.) 379, Fed. Cas. No. 16547; In re Norris, 2 Hask. (U. S.) 19, Fed. Cas. No. 10302; Hawkins v. Hastings Bank, 1 Dill. (U. S.) 462, Fed. Cas. No. 6244; United States v. Baxter, 46 Fed. 350; Gunter v. Williams, 40 Ala. 561; Pacific Mut. Life Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; Garden City Nat. Bank v. Schulman, 131 Pac. 559, 89 Kans. 182; Lays v. Hurley, 215 Mass. 582, 103 N. E. 52. See also Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Easter v. Farmers' Nat. Bank, 57 Ill. 215; Trumbull v. Union Trust Co., 33 Ill. App. 319; Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177; Corbett v. Cannon, 57 Kans. 127, 45 Pac. 80; Saufley v. Howard, 7 Dana (Ky.) 367; O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056, 21 Ky. L. 735;

fication, it must appear the partner who is sought to be held thereby had knowledge of the act of his copartner, or should have had such knowledge in the use of ordinary prudence.[44] Such ratification may be accomplished by acquiescence, with knowledge of the fact, in the terms of the agreement after its execution.[45] Thus, acquiescence by one partner in a chattel mortgage executed by the other has been held to amount to a ratification of such mortgage.[46] So, also, a jury would be warranted in finding that each of the firms in whose names the lease was executed had ratified the same where it appears in evidence that the "renting" firm entered into occupation and possession of the premises described in the lease, paid the rent reserved

Stewart v. Caldwell, 9 La. Ann. 419; Waite v. Foster, 33 Maine 424; Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759; Koch v. Endriss, 97 Mich. 444, 56 N. W. 847; Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Meadowcraft v. Walsh, 15 Mont. 544, 39 Pac. 914; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Dow v. Moore, 47 N. H. 419; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. S. 753; G. H. Haulenbeck Advertising Agency v. November, 27 Misc. 836, 60 N. Y. S. 573; Bate v. McDowell, 49 N. Y. Super. Ct. 106; Galway v. Nordlinger, 51 Hun 639, 4 N. Y. S. 649, 21 N. Y. St. 197; McGregor v. Ellis, 2 Disn. (Ohio) 286, 13 Ohio Dec. 175; McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731; Enterprise Oil &c. Co. v. National Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. 746; Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241; Salinas v. Bennett, 33 S. Car. 285, 11 S. E. 968; Hatton v. Stewart, 2 Lea (Tenn.) 233; Metcalf v. Denson, 4 Baxt. (Tenn.) 565; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 665; Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817; Lynch v. Flint, 56 Vt. 46; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885.

[44] Sibley v. American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470; Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122; Holmes v. Kortlander, 64 Mich. 591, 31 N. W. 532; Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817.

[45] Morris v. Brown, 177 Ala. 389, 58 So. 910; Sparks v. Flannery. 104 Ga. 323, 30 S. E. 823; Clark v. Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Corbett v. Cannon, 57 Kans. 127, 45 Pac. 80; Clippinger v. Starr, 130 Mich. 463, 90 N. W. 280; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885; Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336.

[46] Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885.

as required, and used the light, heat, power and water furnished and supplied by the "lessor," and that the latter opened an account on its books for the rent to be paid under the lease, and gave directions to its bookkeeper to make out bills therefor and to collect and receive the same from the "leasing" firm.[47] So, also, it is undoubtedly true that ratification may be evinced by an express parol adoption of the act,[48] and even a deed may be ratified by parol.[49] But it has been held that a partner does not become liable on single bills executed in the firm's name by his copartner who has acted without authority, by acknowledging his liability on the open account which the bills purported to secure.[50] However, where a partnership sues upon a sealed instrument executed by one of the partners in the firm name, it thereby ratifies the contract.[51] And an offer to recognize as valid an unauthorized act, upon condition, is not a ratification, unless the condition is performed.[52]

§ 472. **Ratification by receipt of benefits.**—Likewise ratification may in general be implied as from a receipt, with full knowledge, of the benefits of the transaction.[53] The receipt

[47] Golding v. Brennan, 183 Mass. 286, 67 N. E. 239. See also Porter v. Curry, 50 Ill. 319, 99 Am. Dec. 520; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759.

[48] Gunter v. Williams, 40 Ala. 561; Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Harper v. Devene, 10 La. Ann. 724; Batty v. Adams, 16 Nebr. 44, 20 N. W. 15; Smith v. Kerr, 3 N. Y. 144.

[49] National Citizens' Bank of Mankato v. McKinley, 152 N. W. 879.

[50] Sibley v. Young, 26 S. Car. 415, 2 S. E. 314.

[51] Dodge v. McKay, 4 Ala. 346.

[52] Hurt v. Clarke, 56 Ala. 19, 28 Am. Rep. 751; Koch v. Endriss, 97 Mich. 444, 56 N. W. 847.

[53] Smith v. Packard, 98 Fed. 793, 39 C. C. A. 294; Markell v. Matthews, 3 Colo. App. 49, 32 Pac. 176; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Porter v. Curry, 50 Ill. 319, 99 Am. Dec. 520; Porter v. Wilson, 113 Ind. 350, 15 N. E. 676; Fordsville Banking Co. v. Thompson, 26 Ky. L. 534, 82 S. W. 251; Arick's Succession, 22 La. Ann. 501; Weld v. Peters, 1 La. Ann. 432; Golding v. Brennan, 183 Mass. 286, 67 N. E. 239; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Davis v. Berger, 54 Mich. 652, 20 N. W. 629; Doll v. Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625; Levy v. Abramsohn, 39 Misc. 781, 81 N. Y. S. 344; Person v. Carter, 7 N. Car. 321; Kramer v. Dinsmore, 152 Pa. St. 264, 25 Atl. 789; In re Appeal of Levick, 1 Sad. (Pa.) 365, 2 Atl. 532; Stro-

of a part of the purchase-price of the real estate belonging to a partnership which has been sold by one of the partners may operate as a ratification of such sale.[54] The same principle would probably apply when money is received on a promissory note executed by one of the partners in the name of the firm,[55] and is used in the partnership business.[56] Even though fraud on the vendor accompanies the procuring of goods by a partner for the use of his firm, the receipt and participation in the use of such goods by the other partners may establish the liability of the firm for the act of the partner who obtained the property.[57] So, too, where a partner who purports to act for his firm enters into a contract with one of the judgment debtors of the partnership, which provides that the debtor shall discontinue proceedings to open his judgment and shall consent to a sale of his land on execution, the same to be conveyed to his wife if purchased by the partnership, the latter will ratify the agreement by issuing execution after the discontinuance has been entered and by purchasing the property at the subsequent sale.[58] Again a partner ratifies the sale of property of which he subsequently asserts that he was individually possessed, by consenting to its resale by the purchaser and by leasing to the latter's transferee the realty on which the property was located

man v. Varn, 19 S. Car. 307; Allen v. Meyer (Tex. Civ. App.), 65 S. W. 645; Guthiel v. Gilmer, 27 Utah 496, 76 Pac. 628; Lynch v. Flint, 56 Vt. 46; McDougall v. McDonald (Wash.), 150 Pac. 628. See also Richardson v. Ames, 79 Wis. 237, 48 N. W. 423. "If the sale [of all the goods of a mercantile partnership] was made subject to the condition that the other partner should assent to it, his assent or subsequent ratification must be shown; but such assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances in evidence." Ellis v. Allen, 80 Ala. 515, 2 So. 676.

[54] Thomas v. Scott, 3 Rob. (La.) 256; Weld v. Peters, 1 La. Ann. 432.

[55] O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056, 21 Ky. L. 735. See also American Exch. Nat. Bank v. Georgia Const. &c. Co., 87 Ga. 651, 13 S. E. 505.

[56] Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177. See also Baldwin's Bank v. Morris, 144 N. Y. 637, 39 N. E. 493.

[57] Levy v. Abramsohn, 39 Misc. 781, 81 N. Y. S. 344. See also Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738.

[58] Kramer v. Dinsmore, 152 Pa. St. 264, 25 Atl. 789.

for the purpose of conducting thereon the same business as had the partnership, and this notwithstanding the fact that at the time of the sale he registered the objection that the property was mortgaged to a third person.[59]

§ 473. **Ratification by failure to repudiate.**—If one partner fails to repudiate an unauthorized act of the other within a reasonable time after he has acquired knowledge thereof, he will ordinarily be held to have ratified the same.[60] While a partner does not necessarily ratify by failing to repudiate within eight days,[61] repudiation, postponed for the period of one year[62] or for four years after full knowledge of the facts is acquired, has been held not to have been made within a reasonable time.[63] As opposed to this view of the matter, it has been held that a partner is not required by law to deny his liability until it is sought to be enforced and, therefore, that mere silence or omission to repudiate upon knowledge of the facts will not per se be equivalent to ratification.[64] But mere knowledge and failure to deny liability where a partner gave a firm note for a debt in part his, individually, has been held not a ratification of the entire debt.[65]

[59] Morris v. Brown, 177 Ala. 389, 58 So. 910. See also Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817 (affd. 27 Utah 496, 76 Pac. 628).

[60] Murphy v. Whitlow, 1 Ariz. 340, 25 Pac. 532; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Parsons v. Ponting, 46 Ill. App. 101; Johnson v. McClary, 131 Ind. 105, 30 N. E. 888; Thompson v. Gosserand, 131 La. 1056 (held estopped to deny liability); In re Succession of Arick, 22 La. Ann. 501; Swan v. Stedman, 4 Metc. (Mass.) 548; Clippinger v. Starr, 130 Mich. 463, 90 N. W. 280; Van Dyke v. Seelye, 49 Minn. 537, 52 N. W. 215; Standard Oil Co. v. Hoese, 57 Nebr. 665, 78 N. W. 292; Hodenpyl v. Hines, 160 Pa. St. 466, 28 Atl. 825; Livingston v. Pittsburg & S. R. Co., 2 Grant Cas. (Pa.) 219.

[61] Johnson v. McClary, 131 Ind. 105, 30 N. E. 888.

[62] Clippinger v. Starr, 130 Mich. 463, 90 N. W. 280. That repudiation does not ipso facto impose liability upon the partner refusing to ratify, see Jamison v. Cullom, 110 La. 781, 34 So. 775.

[63] Marine Co. of Chicago v. Carver, 42 Ill. 66.

[64] Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215. See also Barnard v. Lapeer &c. Plank Road Co., 6 Mich. 274; and Tyree v. Lyon, 67 Ala. 1; Reubin v. Cohen, 48 Cal. 545; Ferguson v. Shepherd, 33 Tenn. 254.

[65] Brown v. First Nat. Bank, 35 Okla. 726, 130 Pac. 140.

Again, ratification will not have been effected where the partner by whom the same is alleged to have been made has not had full knowledge of all material facts[66] or at least, a knowledge of such facts as would have put him on inquiry.[67] Actual knowledge of the accommodation character of an indorsement in the firm name, and of the circumstances attendant thereupon is not required in order for the ratification of the nonacting partner to be binding. If the latter ratify the act of his copartner in incurring the liability and assume to personally discharge the same upon notice of such facts only as would serve to put a reasonably prudent man upon inquiry, he becomes charged with all the facts discoverable had he made duly diligent inquiry. This being the case, it will be proper in an action on the note to refuse a charge which, by making the binding force of the ratification dependent upon actual knowledge, excludes from consideration the effect of the constructive knowledge which might have been obtained by inquiry.[68] Moreover, failure to understand the legal effects of the contract will not avoid a ratification otherwise valid.[69]

§ 474. **Ratification by retiring partner.**—Further, in connection with this subject it seems that retiring partners may ratify the acts of the one or ones continuing.[70] But "Evidence

[66] Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Wheeler v. Timpson, 59 Hun 625, 13 N. Y. S. 640, 37 N. Y. St. 210; Hull v. Young, 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521; Biggs v. Hubert, 14 S. Car. 620. And compare Meyer v. Hegler, 121 Cal. 682, 54 Pac. 271; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929.

[67] Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122. See Casey v. Carver, 42 Ill. 225; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Peterson v. Armstrong, 24 Utah 96, 66 Pac. 767.

[68] Sibley v. American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470. See also Atkinson v. Howlett, 11 Ky. L. (abstract) 364; Woodward v. Winship, 12 Pick. (Mass.) 430; Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350. And compare Tootle v. Rice, 53 Kans. 576, 36 Pac. 990; Hayes v. Baxter, 65 Barb. (N. Y.) 181.

[69] Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

[70] Van Valkenburg v. Bradley, 14 Iowa 108, overruling Kemp v. Coffin, 3 G. Greene (Iowa) 190. See also Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Sanborn v. Stark, 31 Fed. 18; Silas v. Adams, 92 Ga. 350, 17 S. E. 280; Roberts v. Barrow, 53 Ga.

that members of a partnership, after beginning the transaction of the partnership business, ratified certain unauthorized acts done in its behalf, and in anticipation of its formation, by one who has become a member of such partnership, is not proof of the ratification of another unauthorized act so done by such person at a time when he had no power to act in its behalf."[71] Moreover, "ratification" of an assignment by one partner of the firm property will not validate the same as to creditors who have acquired rights by attachment or garnishment before the contract is "ratified."[72] Again, it is held that neither a "ratification" by the contracting partner alone[73] nor by a single one of the several remaining partners is binding upon the firm.[74]

§ 475. **Estoppel.**—There remains still another method by which a partner may impose upon himself partnership obligations, and that is by estoppel. This occurs when one holds himself out, or knowingly permits himself to be held out, as a partner in a particular firm. He is thereby rendered liable upon contracts made by his copartners for the firm to third persons who knew of and acted in reliance upon such representation, or holding out.[75] Thus it seems that a partnership may be liable on con-

314; Chamberlain v. Stone, 24 Ga. 310; Carter v. Pomeroy, 30 Ind. 438; Conklin v. Ogborn, 7 Ind. 553; Eaton v. Taylor, 10 Mass. 54; Fowle v. Harrington, 1 Cush. (Mass.) 146; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241; Hatton v. Stewart, 2 Lea (Tenn.) 233; McElroy v. Melear, 7 Cold. (Tenn.) 140.

[71] Cody v. First Nat. Bank, 103 Ga. 789, 30 S. E. 281 (syllabus by the court).

[72] Coleman v. Rosenfeld, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253. See also Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69; and Mayer v. Bernstein, 69 Miss. 17, 12 So. 257.

[73] Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

[74] North Star Boot & Shoe Co. v. Stebbins, 2 S. Dak. 74, 48 N. W. 833.

[75] Steele v. Michigan Buggy Co., 50 Ind. App. 635, 95 N. E. 435, quotes Farmers' Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35, as follows: "To constitute an estoppel in pais, the following elements must be present: (1) A representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) the representations must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced thereby to act." See further Kuriger v. Joest, 22

tracts entered into by one who has been permitted to act as a member of the firm.[76] And a partner who for years has remained silent as to the character of business done by the firm, is held estopped to deny that an act, of which he had known for a long time without repudiating it, was without the scope of his copartner's authority.[77] And any partner is estopped to deny his liability for a copartner's conduct, where a third person has changed his position for the worse, because of the acts of such copartner within the apparent scope of his authority, or with the other partner's consent.[78] And a partner who has permitted a copartner to be

Ind. App. 633, 52 N. E. 764, 54 N. E. 414; Roberts v. Abbott, 127 Ind. 83, 26 N. E. 565; Waugh v. Carver, 2 H. Bl. 235; De Berkom v. Smith, 1 Esp. 29; Morris v. Brown, 177 Ala. 389, 58 So. 910; Nicholson v. Moog, 65 Ala. 471; Deputy v. Harris, 1 Marv. (Del.) 100, 40 Atl. 714, 1 Hardesty 92; Mitchell v. Craig, 11 Ga. App. 79, 74 S. E. 716; Bartlett v. Powell, 90 Ill. 331; Eggleston v. Mason, 84 Iowa 630, 51 N. W. 1; Rider v. Hammell, 63 Kans. 733, 66 Pac. 1026; Fennell v. Myers, 25 Ky. L. 589, 76 S. W. 136; Johnson v. Levy, 109 La. 1036, 34 So. 68; Lighthiser v. Allison, 100 Md. 103, 59 Atl. 182; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Kritzer v. Sweet, 57 Mich. 617, 24 N. W. 764; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Rittenhouse v. Leigh, 57 Miss. 697; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136; Stettheimer v. Tone, 114 N. Y. 501, 21 N. E. 1018; Cassidy v. Hall, 97 N. Y. 159; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000, 134 Am. St. 987; Penfield v. Mason, 9 Ohio C. D. 611, 17 Ohio Cir. Ct. 165; Enterprise Oil &c. Co. v. National Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. 746; In re Scull's Appeal, 115 Pa. St. 141, 7 Atl. 588; Salinas v. Bennett, 33 S. Car. 285, 11 S. E. 968; Nugent v. Allen, 95 Tenn. 97, 32 S. W. 9; Hamner v. Barker (Tex. Civ. App.), 144 S. W. 1180; Kelton v. Leonard, 54 Vt. 230; Matthies v. Herth, 31 Wash. 665, 72 Pac. 480; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625, note in 18 L. R. A. (N. S.) 988; Smith v. Ure, 2 Knapp 188. One who, by his acts or conduct, authorizes a stranger to believe that he is a partner, is, as to such stranger, a partner. Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[76] Chicago Trust & Savings Bank v. Kinnare, 174 Ill. 358, 51 N. E. 607; Peninsular Sav. Bank v. Currie, 123 Mich. 666, 82 N. W. 511; Tyler v. Omeis, 76 Minn. 537, 79 N. W. 528.

[77] Thompson v. Gosserand, 131 La. 1056, 60 So. 682.

[78] Elliott v. Holbrook, 33 Ala. 659; Jones v. Hendrix (Ark.), 127 S. W. 720; Burritt v. Dickson, 8 Cal. 113; Merchants' & Farmers' Bank v. Johnston, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969n; Davies v. Atkinson, 25 Ill. App. 260 (affd. 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373); Thompson v. Gosserand, 131 La. 1056, 60 So. 682; Heffron v. Hanaford, 40 Mich. 305; Hoeffler v. Westcott, 15

placed in a situation such that he can apparently transfer good title to firm property, is estopped to question such title.[79] So, also, property used by an ostensible partner in conducting the business may undoubtedly, in equity, be regarded as the joint property of the firm and creditors be permitted to subject the same to the payment of their debts.[80] Before one will be estopped to deny his liability as a partner, it is essential in general that he be guilty of some wrongful act or omission. One who is not a partner and has no knowledge of the fact that he has been held out as a partner, and one who has been neither negligent nor at fault in the matter can not be held liable.[81] Thus the declarations of a person that another is associated with him in the partnership relation where there is no partnership in fact do not ordinarily bind the alleged partner when such declarations are not made in his presence or with his knowledge or consent.[82] Under such circumstances, neither partnership nor agency being actually existent, the declarant's statements will not, as a general rule, be admissible in evidence against the one referred to in the declarations,[83] the latter, in the absence of other evidence, bind-

Hun (N. Y.) 243; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000, 134 Am. St. 987; Tams v. Hitner, 9 Pa. St. 441.

[79] Paxson v. Brown, 61 Fed. 874, 10 C. C. A. 135; Cross v. Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. 902; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Moran v. Palmer, 13 Mich. 367; Patton v. Barnett, 12 Wash. 576, 41 Pac. 901; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 665.

[80] Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. 887.

[81] It has been said that one who denies that he is a partner is estopped to prove partnership as against the rights of intervening third persons. Willard v. Bullen, 41 Ore. 25, 67 Pac. 924, 68 Pac. 422. See however, Hoaglin v. Henderson, 119 Iowa 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. 335, in which a debtor was not permitted to set off a claim he held against one of the partners when he had dealt with such partner in his individual capacity and without knowledge that he was acting for a partnership. See further Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112; Seabury v. Bolles, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136. See also note in 18 L. R. A. (N. S.) 992.

[82] See Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Frisbie v. Felton, 65 Vt. 138, 26 Atl. 110; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812.

[83] Thompson v. Mallory, 108 Ga. 797, 33 S. E. 986; Keim &c. Hardw.

ing no one but the party making them.[84] Moreover, a person who without knowledge of the fact on his part is falsely represented as being a partner need not exercise diligence in ascertaining and contradicting the report that he is such.[85] Thus, in the absence of proof of the defendant's authorization of, or assent to the article, estoppel can not be predicated of the failure of one, attempted to be held as a partner, to publish a denial of an article, appearing in a trade paper, which informed the public as item of news, that he and his alleged partner had entered into a partnership and would transact business under a designated firm name.[86] Even, "where one inserts in a newspaper an advertisement of a partnership between himself and other persons, which does not in fact then exist, the latter are not affected by such advertisement, in the absence of evidence showing that they knew of and acquiesced in it."[87] But where the name of a certain person is at the latter's instance used in the name of a firm, such person can not deny his liability on contracts executed by the firm.[88] Even where no firm ever existed by the name of "Hill & Co." and Hill and Harrington were never partners, if the former consents to the use of his name by the latter, merely enjoining him not to use it in a manner that will injure him, he will be liable on a promissory note signed "Hill & Co. by Harrington."[89] There is no estoppel of a partner because of repre-

Co. v. Williams, 154 Mo. App. 716, 136 S. W. 1; Wolle v. Brown, 4 Whart. (Pa.) 365. See also Salinas City Bank v. DeWitt, 97 Cal. 78, 31 Pac. 744; Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397.

[84] Dodds v. Everett-Ridley-Ragan Co., 110 Ga. 303, 54 S. E. 1004; McCann v. McDonald, 7 Nebr. 305; Whitney v. Ferris, 10 Johns. (N. Y.) 66.

[85] Campbell v. Hastings. 29 Ark. 512. See also Butler v. Hinckley, 17 Colo. 523, 30 Pac. 250.

[86] Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112.

[87] First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831 (syllabus by the court). But see Williams v. Rogers, 14 Bush (Ky.) 776.

[88] Speer v. Bishop, 5 Ohio Dec. 128, 3 Am. L. Rec. 91 (affd. 24 Ohio St. 598).

[89] Smith v. Hill, 45 Vt. 90, 12 Am. Rep. 189.

sentations made by a copartner as to the title to property of which the other partner is ignorant and for which he is not responsible.[90]

§ 476. **Estoppel—Reliance of third party.**—Further on this subject, the wrongful act or omission that is relied upon to create an estoppel must, it seems, have been acted on in good faith by the party in whose favor the same is sought to be invoked.[91] Should the latter have no knowledge, at the time the contract is entered into, that the person against whom he subsequently seeks to enforce liability was being held out as a partner, an estoppel does not exist in his favor,[92] any more than it does when he knew of the holding out, but also knew that the parties were in reality not partners.[93] Thus it will be proper to refuse an instruction requiring the jury to find the defendant liable if he has held himself out to the general public or to the plaintiff as a member of the firm whose name is signed to the note in suit, it being possible to construe such instruction to mean that the defendant is liable if he has held himself out to the public as a partner, notwithstanding the plaintiff has had no knowledge of such fact.[94] But reliance by a subscriber upon information transmitted to him by a mercantile agency which in turn has received it from the defendant himself, to the effect that the latter is a full partner in a certain firm, estops such defendant

[90] Andrews v. Clark, 5 Nebr. (Unof.) 361, 98 N. W. 655.

[91] Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Seabury v. Bolles, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136.

[92] Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. 689; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Wood v. Pennell, 51 Maine 52; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Carey v. Marshall, 67 N. J. L. 236, 51 Atl. 698; Cook v. Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Denithorne v. Hook, 112 Pa. St. 240, 3 Atl. 777; Hicks v. Cram, 17 Vt. 449.

[93] Nightingale v. Milwaukee Furniture Co., 71 Fed. 234; Krans v. Luthy, 56 Ill. App. 506; Booe v. Caldwell, 12 Ind. 12; Pratt v. Langdon, 97 Mass. 97, 93 Am. Dec. 61; Beudel v. Hettrick, 45 How. Pr. 198, 3 Jones & S. (N. Y.) 405; Alderson v. Pope, 1 Camp. 404n. And compare Brown v. Leonard, 2 Chit. 120; Stearns v. Haven, 14 Vt. 540.

[94] Sheldon v. Bigelow, 118 Iowa 586, 92 N. W. 701.

from denying his liability as a member of the partnership.[95] On the other hand when a private corporation can not enter into the partnership relation with another, one with whom such corporation deals is bound to know this fact and can not impute liability to it on the contract of the person which it has held out as its partner.[96] Again, evidence that the owner of the building witnessed the partnership agreement of the contractor and another, and subsequently accepted receipts for money paid by him on the contract which were signed by both the individuals, does not conclusively establish the fact that he dealt with the partners as such.[97] So, too, a verdict should be directed for R, defendant in a suit on a note signed by another, "R. & Co." where the evidence shows that R permitted the use of his name only to make possible the obtaining of a license to carry on the business in the course of which the note is given, and that the plaintiff's drummer when he sold the goods whose price is evidenced by the instrument in suit was informed of R's connection with the business, and this, notwithstanding such instrument was given to a second agent of the plaintiff.[98]

[95] Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836. See also Iowa Leather & Saddlery Co. v. Hathaway (Iowa), 78 N. W. 193. And compare Sohn v. Freiberg, 6 Ohio Dec. 1175, 11 Am. L. Rec. 736, 9 Wkly. L. Bul. 290.

[96] Murray Ginning System Co. v. Exchange Nat. Bank (Tex. Civ. App.), 61 S. W. 508. See also Spaulding v. Nathan, 21 Ind. App. 122, 51 N. E. 742.

[97] Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315.

[98] Willis v. Rector, 50 Fed. 684, 1 C. C. A. 611. But see In re Krueger, 2 Lowell (U. S.) 66, Fed. Cas. No. 7941.

CHAPTER XVI

LIABILITY OF PARTNERS TO THIRD PERSONS

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§ 485. In general—Scope of chapter.—It is perhaps safe to say that a partnership is liable for all the acts of its members within the scope of their authority and of the firm business, or for any legal acts authorized or ratified properly, as has been seen in the preceding chapters. The question then arises as to the liability of each individual partner to the firm creditors. As

to contracts this chapter is concerned only with the general liability of the firm and its members in contracts and with the nature and extent of such liability. In the preceding chapter the powers of one partner to bind the firm by contracts were considered, and reference must be made to that chapter as to the liability of the firm and partners on a contract of any particular kind entered into by one partner on behalf of the firm. As to torts, the chapter will contain not only a discussion of the general nature and extent of partnership liability, but also a more particular discussion of the classes of torts for which a partnership or partner is liable. There are many other rights of third persons and creditors, such as the rights to proceed against partners for firm debts, or against the firm to secure the interest of a debtor partner, to an accounting, to proceed against the debtor firm to secure its assets, of its rights after dissolution or under bankruptcy laws, which might be discussed in this chapter, but such rights will be considered hereafter under the chapters which take up such rights in detail, and in order to avoid repetition will not be treated at this time.

§ 486. **Contracts binding upon partnership.**—Without reference to any other questions that may enter in, the general rule is that all contracts made by a partner, within the scope of his actual or apparent authority, in the firm name, are binding on the partnership[1] and all of its members. Neither dormant, si-

[1] A partner has "full power to dispose of the firm property and assets in the course of the business of the firm." Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641. See further Reid v. Hollinshead, 4 B. & C. 867; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391; In re Warren, 2 Ware (U. S.) 322, Fed. Cas. No. 17191; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630, Fed. Cas. No. 16872; Felichy v. Hamilton, 1 Wash. (U. S.) 491, Fed. Cas. No. 4719; National Bank v. Dickinson, 107 Ala. 265, 18 So. 144; Rolston v. Click, 1 Stew. (Ala.) 526; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Roberts v. Totten, 13 Ark. 609; Dammon v. Beecher, 97 Cal. 530, 32 Pac. 573; Rocky Mountain Nat. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Ellison v. Stuart, 2 Penn. (Del.) 179, 43 Atl. 836; Shaw v. Jones, 133 Ga. 446, 66 S. E. 240; Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122;

lent, nominal nor secret members of the partnership will, on account of their peculiar connection with the firm, be exempt

Brewster v. Hardeman, Dudley (Ga.) 138; Cherry Lake Turpentine Co. v. Lanier Armstrong Co., 10 Ga. App. 339, 73 S. E. 610; Dreyfus v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Kitner v. Whitlock, 88 Ill. 513; Weirick v. Graves, 73 Ill. App. 266; Wiley v. Stewart, 23 Ill. App. 236; Iddings v. Pierson, 100 Ind. 418; Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Carson v. Byers, 67 Iowa 606, 25 N. W. 826; Beebe v. Rogers, 3 G. Greene (Iowa) 319; Pitkin v. Benfer, 50 Kans. 108, 31 Pac. 695, 34 Am. St. 110; Deitz v. Regnier, 27 Kans. 94; Scruggs v. Russell, McCahon (Kans.) 39, 1 Kans. (Dass. ed.) 478; Holderman v. Tedford, 7 Kans. App. 657, 53 Pac. 887; Patterson v. Swickard, 19 Ky. L. 661, 41 S. W. 435; Ferguson v. Sims, 3 Ky. L. (abstract) 684; Davis v. Wiley, 3 Ky. L. 315; Rochester v. Trotter, 1 A. K. Marsh. (Ky.) 54; Shreveport v. Mandel Bros., 128 La. 314, 54 So. 831; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Willard v. Wright, 203 Mass. 406, 89 N. E. 559; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Boardman v. Gore, 15 Mass. 331; Manufacturers' & Mechanics' Bank v. Gore, 15 Mass. 75, 8 Am. Dec. 83; Hayward v. French, 12 Gray (Mass.) 453; Kennebec Co. v. Augusta Ins. &c. Co., 6 Gray (Mass.) 204; Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627; Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Harvey v. McAdams, 32 Mich. 472; Moran v. Palmer, 13 Mich. 367; Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Graham v. Thornton (Miss.), 9 So. 292; Prince v. Crawford, 50 Miss. 344; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Faler v. Jordan, 44 Miss. 283; Eau Claire St. Louis Lumber Co. v. Gray, 81 Mo. App. 337; Habig v. Layne, 38 Nebr. 743, 57 N. W. 539; Roney v. Buckland, 4 Nev. 45; National State Capital Bank v. Noyes, 62 N. H. 35; Tucker v. Peaslee, 36 N. H. 167; Gould v. Gould, 36 N. J. Eq. 380; Burchell v. Voght, 164 N. Y. 602, 58 N. E. 1085; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Crocker v. Colwell, 46 N. Y. 212; Paul v. Stevens, 57 Hun 171, 32 N. Y. St. 851, 10 N. Y. S. 442; Onondaga County Bank v. De Puy, 17 Wend. (N. Y.) 47; Springs v. McCoy, 122 N. Car. 628, 29 S. E. 903; French v. Griffin, 104 N. Car. 141, 10 S. E. 166; Abpt v. Miller, 5 Jones L. (N. Car.) 32; Penfield v. Mason, 9 Ohio C. D. 611, 17 Ohio C. C. 165; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Real Estate Investment Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855; Potts v. Taylor, 140 Pa. St. 601, 21 Atl. 443; Edwards v. Tracy, 62 Pa. St. 374; Yeager v. Wallace, 57 Pa. St. 365; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Mitchell v. Beatty, 1 Phila. (Pa.) 133; Grollman v. Lipsitz, 43 S. Car. 329, 21 S. E. 272; Munroe v. Williams, 35 S. Car. 572, 15 S. E. 279; Venable v. Levick, 2 Head (Tenn.) 351; Pooley v. Whit-

from liability.[2] This rule, of course, obtains only where the other parties have had no notice of any limitation upon the actual authority of such partner to contract. "It is, undoubtedly, a generally accepted doctrine that 'whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people.' * * * It is equally well settled that where a party dealing with a partner has notice of the limitations upon the

more, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Richardson v. Cato, 10 Humph. (Tenn.) 138; Randall v. Meredith, 76 Tex. 669, 13 S. W. 576; Burnley v. Rice, 18 Tex. 481; Crozier v. Kirker, 4 Tex. 252, 51 Am. Dec. 724; Caraway v. Citizens' Nat. Bank (Tex. Civ. App.), 29 S. W. 506; Anderson v. Clayton, 39 Utah 343, 117 Pac. 41; Davis v. Evans, 39 Vt. 182; Miner v. Downer, 19 Vt. 14; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817; Rogers v. Brightman, 10 Wis. 55. The facts of the case may render it proper for the jury to fix the character of the transaction, as either within or without the scope of the partnership business. Stoakes v. Larson, 108 Minn. 234, 121 N. W. 1112. See also Crosswell v. Lehman, Durr & Co., 54 Ala. 363, 25 Am. Rep. 684; Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Todd v. Jackson, 75 Ind. 272; Custard v. Hodges, 155 Mich. 361, 119 N. W. 583; Hoffmaster Sons' Co. v. Hodges, 154 Mich. 641, 118 N. W. 484; Prince v. Crawford, 50 Miss. 344; Cargill v. Corby, 15 Mo. 425; G. H. Haulenbeck Adv. Agency v. November, 27 Misc. 836, 60 N. Y. S. 573; Wallace v. Reed, 54 Tex. Civ. App. 457, 117 S. W. 1019.

[2] Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; In re Munn, 3 Biss. (U. S.) 442, Fed. Cas. No. 9925; Bank of Alexandria v. Mandeville, 1 Cranch (U. S.) 575, Fed. Cas. No. 851; Oppenheimer v. Clemmons, 18 Fed. 886; McDonald v. Clough, 10 Colo. 59, 14 Pac. 121; Everitt v. Chapman, 6 Conn. 347; Griffin v. Orman, 9 Fla. 22; Lindsey v. Edmiston, 25 Ill. 359; Gilmore v. Merritt, 62 Ind. 525; Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Cochran v. Anderson County Nat. Bank, 83 Ky. 36, 6 Ky. L. 168; Boudreaux v. Martinez, 25 La. Ann. 167; Butts v. Tiffany, 21 Pick. (Mass.) 95; Lea v. Guice, 13 Smed. & M. (Miss.) 656; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Elliot v. Stevens, 38 N. H. 311; Cammack v. Johnson, 2 N. J. Eq. 163; Poillon v. Secor, 61 N. Y. 456; Tournade v. Hagedorn, 5 Thomp. & C. (N. Y.) 288; Hill v. Voorhies, 22 Pa. St. 68; Green v. People's Warehouse Co., 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015; Nichols

partner's authority the partnership is not bound."[3] In case the partnership occupies the position of an undisclosed principal the

v. Cheairs, 4 Sneed (Tenn.) 229; Bradshaw v. Apperson, 36 Tex. 133.

[3] Slayden &c. Co. v. Lance, 151 N. Car. 492, 66 S. E. 449. See further Cox v. Hickman, 8 H. L. Cas. 268; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; National Exch. Bank v. White, 30 Fed. 412; Bradley Fertilizer Co. v. Pollock, 104 Ala. 402, 16 So. 138; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157; Bishop v. People's Bank, 7 Ga. App. 432, 67 S. E. 119; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Straus v. Kohn, 83 Ill. App. 497; Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Devin v. Harris, 3 G. Greene (Iowa) 186; Deitz v. Regnier, 27 Kans. 94; Barker v. Mann, 5 Bush (Ky.) 672, 96 Am. Dec. 373; Brooks-Waterfield Co. v. Carpenter, 21 Ky. L. 851, 53 S. W. 40; Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Waldo Bank v. Lumbert, 16 Maine 416; Porter v. White, 39 Md. 613; Maltby v. Northwestern Virginia R. Co., 16 Md. 422; Stimson v. Whitney, 130 Mass. 591; Bailey v. Clark, 6 Pick. (Mass.) 372; Hotchin v. Kent, 8 Mich. 526; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; King v. Levy (Miss.), 13 So. 282; Bloom v. Helm, 53 Miss. 21; Hayes v. Blaker, 138 Mo. App. 24, 119 S. W. 1004; Bates v. Forcht, 89 Mo. 121, 1 S. W. 120; Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; People v. Devlin, 63 Misc. 363, 118 N. Y. S. 478; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000, 134 Am. St. 987; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; Yeager v. Wallace, 57 Pa. St. 365; Ex parte Wilson, 84 S. Car. 444, 66 S. E. 675; Chapman v. Devereux, 32 Vt. 616. See also Corning v. Abbott, 54 N. H. 469; Frost v. Hanford, 1 E. D. Smith (N. Y.) 540; Johnson v. Mon Lee, 30 N. Y. St. 392, 10 N. Y. S. 9; Osgood v. Glover, 7 Daly (N. Y.) 367; Benninger v. Hess, 41 Ohio St. 64; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Nichols v. Cheairs, 4 Sneed. (Tenn.) 229; Stout v. Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808; Tyler v. Scott, 45 Vt. 261. But "a member of a mining partnership has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. For instance, the law does not imply any authority to a member of a mining partnership to borrow money, to employ counsel, to execute a promissory note, or to draw or accept bills of exchange, no matter how pressing the necessity for the use of the money. The reason assigned for the distinction and for limiting the powers of members of a mining partnership, is that such a partnership is not founded on the delectus personae, whereas other partnerships are. For these reasons, it is held that the powers of members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary for the transaction of its busi-

other party has the right to proceed against either the agent or against the firm as principal.[4] All of this comes about by reason of the dependency of the law of partnership upon that of agency, —persons associated together in the partnership relation being antecedently principals, subsequently partners.[5] Consequently, unless there is another limit upon the actual authority of the individual members of an ordinary partnership[6] by an express

ness, or which are usual in like concerns. But a partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which are usual in like concerns, unless there is an express agreement to the contrary known to the party contracting with the firm." Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

[4] Snead v. Barringer, 1 Stew. (Ala.) 134; Morse v. Richmond, 97 Ill. 303; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Seekell v. Fletcher, 53 Iowa 330, 5 N. W. 200; Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310; Clement v. British-American Assur. Co., 141 Mass. 298, 5 N. E. 847; Bracken v. March, 4 Mo. 74; Tucker v. Peaslee, 36 N. H. 167; Howell v. Adams, 68 N. Y. 314; Galway v. Nordlinger, 51 Hun 639, 4 N. Y. S. 649, 21 N. Y. St. 197 (affd. 121 N. Y. 699, 24 N. E. 1100); Poole v. Lewis, 75 N. Car. 417; Kearney v. Snodgrass, 12 Ore. 311, 7 Pac. 309; Given v. Albert, 5 Watts & S. (Pa.) 333; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; McNair v. Rewey, 62 Wis. 167, 22 N. W. 339.

[5] Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co., 92 Ark. 271, 122 S. W. 658; Shaw v. Jones, 133 Ga. 446, 66 S. E. 240; Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641; State v. Brown, 38 Mont. 309, 99 Pac. 954; Schlicher v. Whyte, 74 N. J. Eq. 839, 71 Atl. 337; Elmira Iron &c. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541; Bienenstok v. Ammidown, 11 Misc. 76, 29 N. Y. S. 593, 31 Abb. N. Cas. 400, 59 N. Y. St. 471; People v. Devlin, 63 Misc. 363, 118 N. Y. S. 478; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; McGhee v. Montgomery, 85 S. Car. 207, 65 S. E. 721, 67 S. E. 246; Progressive Lumber Co. v. Rogers (Tex. Civ. App.), 120 S. W. 260; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985.

[6] "Partners of a nontrading firm have no implied power to bind each other, and a creditor seeking to hold one of the partners on commercial paper issued in the firm name must show previous authorization or subsequent ratification of the act by the partner sought to be charged." American Bonding Co. of Baltimore v. Fults, 157 Mo. App. 553, 138 S. W. 689. See also Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co., 92 Ark. 271, 122 S. W. 658; Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Schele v. Wagner, 163 Ind. 20, 71 N. E. 127; Worster v. Forbush, 171 Mass. 423, 50 N. E. 936; Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Wallace v. Reed, 54 Tex. Civ.

agreement,[7] this fact carries with it the presumption that the power of each partner to bind the firm is coextensive with all acts ordinarily made necessary or proper by the nature of the business.[8] Further it seems that where a single partner has en-

App. 457, 117 S. W. 1019; Hatchett v. Sunset Brick &c. Co. (Tex. Civ. App.), 99 S. W. 174; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[7] McCrary v. Slaughter, 58 Ala. 230; Morse v. Richmond, 6 Ill. App. 166, (affd. 97 Ill. 303); Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358; King v. Levy (Miss.), 13 So. 282; Cargill v. Corby, 15 Mo. 425; Corning v. Abbott, 54 N. H. 469; Kramer v. Dinsmore, 152 Pa. St. 264, 25 Atl. 789; Richie v. Levy, 69 Tex. 133, 6 S. W. 685.

[8] Roberts v. Eberhardt, 1 Kay 148, 23 L. J. Ch. 201; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Sanborn v. Cunningham, 99 Cal. xix, 33 Pac. 894; Wasem v. Gray, 43 Colo. 140, 95 Pac. 557; Stillman v. Harvey, 47 Conn. 26; Ellison v. Stuart, 2 Penn. (Del.) 179, 43 Atl. 836; Chandler v. Sherman, 16 Fla. 99; Hahn v. Allen, 93 Ga. 612, 20 S. E. 74; Selman v. Brown, 78 Ga. 332; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Kemp v. Miller, 46 Ill. App. 213; Porter v. Wilson, 113 Ind. 350, 15 N. E. 676; Todd v. Jackson, 75 Ind. 272; Chapple v. Davis, 10 Ind. App. 404, 38 N. E. 355; Fornes v. Wright, 91 Iowa 392, 59 N. W. 51; Van Brunt v. Mather, 48 Iowa 503; Boardman v. Adams, 5 Iowa 224; Lemon v. Fox, 21 Kans. 152; Forbes v. Morehead, 22 Ky. L. 853, 58 S. W. 982; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Rouse v. Hughes, 1 Ky. L. (abstract) 320; White v. Kearney, 2 La. Ann. 639; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Knowlton v. Reed, 38 Maine 246; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565; Porter v. White, 39 Md. 613; Durrell v. Staples, 169 Mass. 49, 47 N. E. 441; Warren v. French, 6 Allen (Mass.) 317; McPherson v. Bristol, 122 Mich. 354, 81 N. W. 254; Lynch v. Hillstrom, 64 Minn. 521, 67 N. W. 636; Lowenberg v. Lewis-Herman Co., 94 Miss. 916, 48 So. 517; Schmidlapp v. S. D. Currie & Co., 55 Miss. 597, 30 Am. Rep. 530; Vaiden v. Hawkins (Miss.), 6 So. 227; Flanagan v. Alexander, 50 Mo. 50; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Creath v. Kolb, 70 Mo. App. 296; Winn v. Hillyer, 43 Mo. App. 139; Mace v. Heath, 30 Nebr. 620, 46 N. W. 918; Wills v. Cutler, 61 N. H. 405; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. 394; People v. Devlin, 63 Misc. 363, 118 N. Y. S. 478; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; Canfield v. Johnson, 144 Pa. St. 61, 22 Atl. 974; Hoskinson v. Eliot, 62 Pa. St. 393; Sweet v. Wood, 18 R. I. 386, 28 Atl. 335; Congdon v. Morgan, 13 S. Car. 190; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Nunn v. Lackey, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1331; Progressive Lumber Co. v. Rogers (Tex. Civ.

tered into a contract as a principal,[9] without the scope of his authority, either express or implied,[10] he can not impose liability therefor upon the firm of which he is a member by establishing the mere fact of its having received the benefit of the transaction.[11]

App.), 120 S. W. 260; Burnley v. Rice, 18 Tex. 481; Cavanaugh v. Salisbury, 22 Utah 465, 63 Pac. 39; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Morse v. Hagenah, 68 Wis. 603, 32 N. W. 634; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Manitoba Mortg. Co. v. Montreal Bank, 17 Can. Sup. Ct. 692; 2 Code Ga. 1911, § 3172. And compare Smith v. Hill, 13 Ark. 173; Stokes v. Stevens, 40 Cal. 391; Davis v. Wiley, 3 Ky. L. 315.

[9] Guice v. Thornton, 76 Ala. 466; Fisher v. Hume, 6 Mackey (D. C.) 9; Goodenow v. Jones, 75 Ill. 48; Hayden v. Cretcher, 75 Ind. 108; Hubenthal v. Kennedy, 76 Iowa 707, 39 N. W. 694; Mousseau v. Thebens, 19 La. Ann. 516; Metzner v. Baldwin, 11 Minn. 150 (Gil. 92); Ferson v. Monroe, 21 N. H. 462; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066, (affd. 54 N. J. Eq. 701, 37 Atl. 1117); Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Ah Lep v. Gong Choy, 13 Ore. 205, 9 Pac. 483; Johnson v. Rankin (Tenn.), 59 S. W. 638; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192. And compare Usher v. Waddingham, 62 Conn. 412, 26 Atl. 538; In re Herrick, 13 Nat. Bankr. Reg. 312, Fed. Cas. No. 6420; Aultman v. Shelton, 90 Iowa 288, 57 N. W. 857; Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402; Brownlee v. Lobenstein (Tenn.), 42 S. W. 467.

[10] See ante §§ 412-414.

[11] Hawtayne v. Bourne, 7 M. & W. 595; Smith v. Craven, 1 Cromp. & J. 500; Emly v. Lye, 15 East 7; Bevan v. Lewis, 1 Sim. 376; Beckham v. Drake, 9 M. & W. 79; Ex parte Apsey, 3 Bro. C. C. 265; Patriotic Bank v. Coote, 3 Cranch (U. S.) 169, Fed. Cas. No. 10807; In re Lamon, 171 Fed. 516; Guice v. Thornton, 76 Ala. 466; Floyd v. Wallace, 31 Ga. 688; Lill v. Egan, 89 Ill. 609; Funk v. Babbitt, 55 Ill. App. 124 (affd. 156 Ill. 408, 41 N. E. 166); Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Brooks-Waterfield Co. v. Carpenter, 21 Ky. L. 851, 53 S. W. 40; Green v. Tanner, 8 Met. (Mass.) 411; Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315; Gates v. Watson, 54 Mo. 585; Ferson v. Monroe, 21 N. H. 462; Union Nat. Bank v. Underhill, 21 Hun (N. Y.) 178; National Bank v. Thomas, 47 N. Y. 15; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; Donnally v. Ryan, 41 Pa. St. 306; Johnson v. Rankin (Tenn.), 59 S. W. 638; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; Willis v. Bremner, 60 Wis. 622, 19 N. W. 403; McLinden v. Wentworth, 51 Wis. 170, 8

§ 487. Apparent scope or partner's authority.—As has been suggested,[12] the firm will ordinarily be bound, speaking in general terms, whenever one of its members shall have consummated a transaction within the apparent scope of his partnership authority. In this connection, however, it is not difficult to understand that a partner will not have acted "apparently within the scope of his authority" who performs in a capacity widely separated from those matters duly connected with the firm's business. But "the question whether a given act can or can not be necessary to the transaction of the business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is necessarily admissible, and as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way. Consequently no answer of any value can be given to the abstract question: Can one partner bind his firm by such an act? Unless having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business, and not in another."[13]

N. W. 118, 192. And compare Blackburn Benefit Building Society v. Cunliffe, 22 Ch. Div. 61; Wenlock v. River Dee Co., L. R. 36 Ch. Div. 675 note; Morris v. First Nat. Bank, 162 Ala. 301, 50 So. 137; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[12] See ante §§ 412-414, 486.

[13] Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733. "The invalidity of an act of one partner does not arise from a want of power nor from the absence of actual knowledge or assent of the other members of the partnership, but from the bad faith of such partner by the perversion of his power for his 'several advantage' and from the knowledge of him with whom he deals of such bad faith." Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817. See further Niemann v. Niemann, 43 Ch. Div. 198; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Kling v. Tunstall, 109 Ala. 608, 19 So. 907;

It is self-evident, however, that this rule loses its force and effect both when the performing partner did actually possess the requisite authority,[14] and again when his act is afterward recognized as its own by the firm of which he is a member.[15] It must be remembered, however, that "when one deals with a member of a partnership, and the latter apparently exceeds his authority to bind his firm, the one dealing with him is put on inquiry, and should ascertain at his risk whether or not the member is acting

Hendrie v. Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; New York Firemen Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Chandler v. Sherman, 16 Fla. 99; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Wittram v. Van Wormer, 44 Ill. 525; McDonald v. Western Tube Co., 64 Ill. App. 458; Moffitt v. Roche, 92 Ind. 96; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Brooks-Waterfield Co. v. Jackson, 21 Ky. L. 851, 53 S. W. 40; Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Cadwallader v. Kroesen, 22 Md. 200; Brickett v. Downs, 163 Mass. 70, 39 N. E. 776; Holmes v. Kortlander, 64 Mich. 591, 31 N. W. 532; Maurin v. Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. 568; Vaiden v. Hawkins (Miss.), 6 So. 227; Ferguson v. Thacher, 79 Mo. 511; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Kneisley Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 S. W. 840; Williams v. Gilchrist, 11 N. H. 535; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Freeman v. Abramson, 30 Misc. 101, 67 N. Y. S. 839; Palliser v. Erhardt, 46 App. Div. 222, 61 N. Y. S. 191; McAulay v. Palmer, 53 Hun 635, 6 N. Y. S. 402, 25 N. Y. St. 969, 3 Silvernail 245; Long v. Carter, 25 N. Car. 238; Conn v. Conn, 22 Ore. 452, 30 Pac. 230; McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512; Green v. People's Warehouse Co., 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015; Venable v. Levick, 2 Head (Tenn.) 351; Scott v. Bandy, 2 Head (Tenn.) 197; Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363; Faires v. Ross (Tex.), 18 S. W. 418; Fore v. Hittson, 70 Tex. 517, 8 S. W. 292; Slayden v. Palmo, 53 Tex. Civ. App. 227, 117 S. W. 1054; Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817; Greene v. Burton, 59 Vt. 423, 10 Atl. 575; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Beardsley v. Tuttle, 11 Wis. 74; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

[14] Kendal v. Wood, L. R. 6 Exch. 243; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Chandler v. Sherman, 16 Fla. 99; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Rollins v. Stevens, 31 Maine 454; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Long v. Carter, 25 N. Car. 238. And compare Butler v. Stocking, 8 N. Y. 408, Seld. Notes 123.

[15] See ante §§ 471-474.

for himself, or for the partnership, with the sanction or authority of his partners."[16]

§ 488. Nature of liability of partner in contract.—In order to consider fully the nature of a partner's liability on firm contracts, a few sections will be devoted to the general subject of joint and joint and several liability in contracts. In all of the remaining chapters and in many of those preceding there are matters which can not be clear without a thorough general understanding of such liability.

§ 489. Joint contracts and several contracts distinguished.—Contracts may be joint, or several, or they may be joint and several. A "joint contract" is one by which two or more promisors are jointly bound to fulfil its obligations and either of whom may be charged with the entire liability arising under the contract or by which two or more obligors are given a joint right.[17] "Several contract" is the antonym of "joint obligation." In the former the liability of each promisor is individual and separate, and is coextensive only with that fraction of the entire obligation assumed by him,[18] or it may be that each severally undertakes the entire liability and remains separately responsible without reference to the liability of his copromisors.[19] A joint and several contract combines the elements found in the two groups just mentioned. When the contract is joint and several its ob-

[16] Victoria Lumber Co. v. Montgomery, 130 La. 120, 57 So. 650 (syllabus by the court).

[17] Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; Black's L. Dict. In Louisiana a different nomenclature is used. In that jurisdiction the term "solidary obligation" is synonymous with the common-law term "joint contracts," and "joint obligation" with the common-law "several contracts." Thus "A joint obligation under the law of Louisiana binds the parties thereto only for their proportion of the debt * * * whilst solidary obligation, on the contrary, binds each of the obligors for the whole debt." Groves v. Sentell, 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. 898.

[18] Evans v. Sanders, 10 B. Mon. (Ky.) 291. See also Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888. See also Bouv. L. Dict.

[19] Lurton v. Gilliam, 1 Scam. (Ill.) 577, 33 Am. Dec. 430; Payne v. Jelleff, 67 Wis. 246, 30 N. W. 526.

ligations are imposed upon each promisor individually and upon all the promisors jointly, and the promisee may elect to sue the parties liable separately on their several engagements or together on their joint undertaking.[20]

§ 490. **Liability of joint obligors.**—Where two or more make a joint promise each is liable to the promisee for the whole debt or liability. Each obligor who is bound at all is legally liable in solido for the whole undertaking.[20a] It is incident to every joint contract that all are bound to its performance. Each and every one of the contractors stipulates that the contract shall be performed by all. If two persons hire a carriage without a driver, and it be broken by the negligence of one who attempts to drive it, both would be liable, although the other was passive and free from blame. So where several persons jointly hire a carriage, horses and driver, and it is a part of the contract that the carriage should be driven by the driver alone, then to permit a stranger to drive it or to drive it themselves would be a violation of the contract, and for any damage arising out of the breach of the joint contract all are liable.[21] Each party to a joint contract is severally liable in one sense, that is, if when sued severally, he does not plead in abatement, he is liable to pay the entire debt, but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, although on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors.[22]

[20] Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783. See also Beecham v. Smith, El. B. & E. 442; Schilling v. Black, 49 Kans. 552, 31 Pac. 143.

[20a] Allin v. Shadburne's Exr., 1 Dana (Ky.) 68, 25 Am. Dec. 121; Perkins County v. Miller, 55 Nebr. 141, 75 N. W. 577; Field v. Runk, 22 N. J. L. 525; Clark v. Rawson, 2 Denio (N. Y.) 135; Slocum v. Fairchild, 7 Hill (N. Y.) 292; Baum v. McAfee (Tex. Civ. App.), 125 S. W. 984. "Where several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt." Ripley v. Crooker, 47 Maine 370, 74 Am. Dec. 491.

[21] O'Brien v. Bound, 2 Speers (S. Car.) 495, 42 Am. Dec. 384.

[22] King v. Hoare, 13 M. & W. 494.

§ 491. Release of one joint debtor releases all.—It is well settled under the common-law rule that the release of one or more joint, or joint and several obligors, operates as a release of all those jointly or jointly and severally liable.[23] The debt is entire and when once satisfied or released can no longer be enforced against any party to it.[24] But under the strict common-law rule, the release, in order to operate as a discharge of the other promisors from their liability on the contract, must be a technical

[23] Nabors v. Camp, 14 Ala. 460; Carroll v. Corbitt, 57 Ala. 579; Johnson v. Collins, 20 Ala. 435; Vandever v. Clark, 16 Ark. 331; Heckman v. Manning, 4 Colo. 543; Merrick v. Giddings, 1 Mackey (12 D. C.) 394, (affd. 115 U. S. 300, 29 L. ed. 403, 6 Sup. Ct. 65); Chamblee v. Davie, 88 Ga. 205, 14 S. E. 195; Clark v. Mallory, 83 Ill. App. 488; Walls v. Baird, 91 Ind. 429; Kirby v. Cannon, 9 Ind. 371; Haney & Campbell Mfg. Co. v. Adaza Co-operative Creamery Co., 108 Iowa 313, 79 N. W. 79; Drake v. Hill, 53 Iowa 37, 3 N. W. 811, 5 N. W. 745; Gardner v. Baker, 25 Iowa 343; Baldwin v. Gray, 4 Mart. (La.) (N. S.) 192, 16 Am. Dec. 169; Merritt v. Bucknam, 90 Maine 146, 37 Atl. 885; Booth v. Campbell, 15 Md. 569; Whitaker v. Salisbury, 15 Pick. (Mass.) 534; Winsor v. Savage, 9 Met. (Mass.) 346; Collier v. Field, 2 Mont. 205; Neligh v. Bradford, 1 Nebr. 451; Young v. Currier, 63 N. H. 419; Saxton v. Dodge, 46 How. Pr. (N. Y.) 467; Harbeck v. Pulin, 145 N. Y. 70, 39 N. E. 722; Dudley v. Bland, 83 N. Car. 220; Woolsey v. Seely, Wright (Ohio) 360; Crawford v. Roberts, 8 Ore. 324; Mortland v. Himes, 8 Pa. St. 265; Brown v. Marsh, 7 Vt. 320; Brodeck v. Farnum, 11 Wash. 565, 40 Pac. 189; Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240; Maslin's Exrs. v. Hiett, 37 W. Va. 15, 16 S. E. 437. A contract may contain covenants that are both joint and several, in which case a release of one of the obligors releases all as to the joint obligations but does not discharge the several covenants. Krbel v. Krbel, 84 Nebr. 160, 120 N. W. 935. The reason for this rule is that if it were otherwise an injustice would be worked against the co-obligors not so released. They would be required to pay more of the joint indebtedness than they had by their contract agreed to pay. See cases cited ante this note. The reason and extent of this rule is well illustrated by cases involving the relation of principal and surety. The release of the principal operates as a discharge of the surety, but the release of the surety does not discharge the principal, for the reason that the principal is not damaged thereby, for his burden is in no way increased and he can not enforce contributions from the surety. Blackburn v. Beall, 21 Md. 208. But where one of the joint promisors is an infant, recovery may be had against the others. Cole v. Manners, 76 Nebr. 454, 107 N. W. 777.

[24] Stanley v. Leahy, 87 Ill. App. 465; Wiggin v. Tudor, 23 Pick. (Mass.) 434; Goodnow v. Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600.

release under seal.[25] The necessity for and effect of a seal upon an instrument which purports to be a release depends largely upon whether the distinctions between sealed and unsealed instruments have been abolished by statute.[26] Quite frequently an instrument is given one of the joint obligors by which the obligee releases one or more of the promisors and reserves his right against the others by appropriate words, such as "reserving my rights against all others," or "but this shall not operate to discharge the others."[27] An instrument of this character, it is said, is in fact not a release, but on the contrary shows that it was not intended by the parties to operate as a release.[28] It operates, according to this view, as a release only to the extent of the amount actually paid by the joint obligor to whom release is given.[29] Consequently when several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the

[25] Shaw v. Pratt, 22 Pick. (Mass.) 305; Ludlow v. McCrea, 1 Wend. (N. Y.) 228; Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; De Zeng v. Bailey, 9 Wend. (N. Y.) 336; Morgan v. Smith, 70 N. Y. 537; Clifton v. Foster (Tex. Civ. App.), 20 S. W. 1005. See however Nicholson v. Revill, 4 Ad. & El. 675; Seligman v. Pinet, 78 Mich. 50, 43 N. W. 1091, holding that "under our laws to-day I think a discharge or acquittance of a debt is just as good without a seal as with it." Milliken v. Brown, 1 Rawle (Pa.) 391, holding that an instrument not under seal which purports to be a release of one of several joint debtors can not be modified by showing that something else was intended.

[26] See Evans v. Pigg, 3 Cold. (Tenn.) 395.

[27] Northern Ins. Co. v. Potter, 63 Cal. 157; Bradford v. Prescott, 85 Maine 482, 27 Atl. 461; McAllester v. Sprague, 34 Maine 296; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Kenworthy v. Sawyer, 125 Mass. 28; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Rogers v. Hosack's Exrs., 18 Wend. (N. Y.) 319; Honegger v. Wettstein, 47 N. Y. Super. Ct. 125; Harbeck v. Pupin, 23 Abb. N. Cas. 190, 7 N. Y. S. 168 (affd. 55 Hun 335, 8 N. Y. S. 695, 29 N. Y. St. 258); Goldbeck v. Kensington Nat. Bank, 147 Pa. 267, 23 Atl. 565 (affg. 10 Pa. County Ct. 97).

[28] Northern Ins. Co. v. Potter, 63 Cal. 157; Bradford v. Prescott, 85 Maine 482, 27 Atl. 461; McAllester v. Sprague, 34 Maine 296. See also Clark v. Mallory, 83 Ill. App. 488, (affd. 185 Ill. 227, 56 N. E. 1099).

[29] Howard v. Yost, 6 Kans. App. 374, 50 Pac. 1098; Ripley v. Crooker, 47 Maine 370, 74 Am. Dec. 491.

residue of the debt. Notwithstanding such receipt, the parties to the contract will remain jointly bound, to the extent of what is unpaid, in the same manner as if no such specific payment had been made.[30] It has been held that the satisfaction of a judgment against one of several tort-feasors bars an action against the others notwithstanding there is inserted in the satisfaction a stipulation that it was not intended to relinquish the judgment against those not expressly released.[31] But the rule that the release of a co-obligor will operate to discharge all the obligors has been held to have no application where the release is made by the consent of all the parties to the instrument.[32] Thus, where a promise releases a joint promisor at the request of the other joint promisors, the latter are not released.[33] An agreement whereby the obligee releases one or more of the joint obligors and reserves his right against the others has been compared to a covenant not to sue, which is not regarded as a release and when given to one of several joint debtors is not construed as a release to the others.[34]

[30] Eldred v. Peterson, 80 Iowa 264, 45 N. W. 755, 20 Am. St. 416 (part payment); Ripley v. Crooker, 47 Maine 370, 74 Am. Dec. 491. Suit can not be maintained against one of three joint promisors on allegations that the other two have paid their share of the amount due. Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088. A receipt for money received from one obligor does not operate as a release when part payment is made and a partial receipt given (Rogers v. Hemsted, Kirby (Conn.) 44; Clifton v. Foster (Tex. Civ. App.), 20 S. W. 1005), or where on part payment a receipt in full is given. Pettigrew Mach. Co. v. Harmon, 45 Ark. 290; Armstrong v. Hayward, 6 Cal. 183; Moore v. Gatewood, 5 Ky. L. (abstract) 777; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; Buckingham v. Oliver, 3 E. D. Smith (N. Y.) 129. It may be otherwise, however, where the receipt is under seal. Hale v. Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. 475.

[31] Ducey v. Patterson, 37 Colo. 216, 86 Pac. 109, 9 L. R. A. (N. S.) 1066, 119 Am. St. 284.

[32] Marks v. Deposit Bank, 21 Ky. L. 117, 50 S. W. 1103; Campbell v. Booth, 8 Md. 107. See also Wandelohr v. Logan, 21 Ky. L. 1773, 56 S. W. 412.

[33] An agreement with other joint obligors to sue the defendant alone in the first instance does not amount to a release of those not sued, and consequently does not release the defendant. Carter v. Long, 125 Ala. 280, 28 So. 74.

[34] Bradford v. Prescott, 85 Maine 482, 27 Atl. 461.

§ 492. Effect of death of joint contractor.—It is the settled rule of the common law that the death of a joint promisor discharges his estate and leaves the survivor liable for the entire amount of the debt.[84a] Upon the death of one of the makers of a joint note his representatives are, at law, discharged, and the survivor alone can be sued.[84b] But in case of a several contract, or of a contract joint and several, the executor or administrator of one of the parties deceased could be sued in a separate action, but not jointly with the survivors, because he was to be charged de bonis testatoris and they de bonis propriis.[84c] A joint contract is an entirety and if one of the joint obligees dies the whole interest vests in the survivor or survivors.[84d] But while, at law, the death of a joint contractor terminates his liability, and the surviving joint contractors alone remain liable, the doctrine of equity is different. In equity, upon the death of one joint contractor, the liability does not rest solely upon the survivors, but may be enforced against the estate of the decedent if an inability to collect from the survivors is shown.[84e] This equitable doc-

[84a] Godson v. Good, 6 Taunt. 587; Seaman v. Slater, 18 Fed. 485; Hawkins v. Ball, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755n; New Haven &c. Co. v. Hayden, 119 Mass. 361; Foster v. Hooper, 2 Mass. 572; Bradley v. Burwell, 3 Denio (N. Y.) 61; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Potts v. Baldwin, 173 N. Y. 335, 66 N. E. 4; Burgoyne v. Ohio Life Ins. & Trust Co., 5 Ohio St. 586; Hogan v. Sullivan, 79 Vt. 36, 64 Atl. 234. In Lane v. Doty, 4 Barb. (N. Y.) 530, Judge Paige remarks: "In case of a joint contract, if one of the parties died, his executor or administrator is at law discharged from liability, and the survivor alone can be sued." "The general rule is, that upon the death of one of several joint contractors before complete performance of the contract, the survivors are bound by the obligations of the contract and entitled to its benefit." Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683, 137 Am. St. 284.

[84b] Towers v. Moor, 2 Vern. 98; Simpson v. Vaughan, 2 Atk. 31; Stevens v. Catlin, 44 Ill. App. 114; Richter v. Poppenhausen, 42 N. Y. 373; Boykin v. Watson, 1 Const. Tr. (S. Car.) 157, 3 Brev. 260.

[84c] Mattison v. Childs, 5 Colo. 78; Seaman v. Slater, 18 Fed. 485; New Haven &c. Co. v. Hayden, 119 Mass. 361.

[84d] Brower v. Nellis, 6 Ind. App. 323, 33 N. E. 672 (holding that Indiana code has not changed the rule); Indiana B. & W. R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5; Semper v. Coates, 93 Minn. 76, 100 N. W. 662. In case of the death of one of two joint obligees who are partners the right to sue vests in the survivor. McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164.

[84e] Simpson v. Vaughan, 2 Atk. 31;

trine has been incorporated into the statutes of several of the states. In some states, the statute provides that if one of several joint contractors dies, his estate may be charged, as if the contract had been joint and several, that is, by an action against the personal representative alone.[84f] And in a number of states there are statutes expressly authorizing an action to be brought against the survivors and the personal representatives of the deceased joint contractor.[84g]

§ 493. Actions on joint and joint and several contracts.— The common-law rule is that all the obligors to a joint contract

Ex parte Kendall, 17 Ves. 514; Hunt v. Rousmanier's Admrs., 8 Wheat. (U. S.) 174, 5 L. ed. 589; Potts v. Dounce, 173 N. Y. 335, 66 N. E. 4; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Voorhis v. Childs, 17 N. Y. 354. The theory upon which the estate of a joint debtor is held bound in equity, is that the obligation is joint and several in equity, although joint in form and only joint in law. In cases where there is an obligation to pay the debt irrespective of the joint obligation, equity will conclusively presume that the parties intended that the contract should have been and was intended to be made joint and several, but was joint in form, by mistake. Hunt v. Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27; United States v. Price, 9 How. (U. S.) 83, 13 L. ed. 56. In Pickersgill v. Lahens, 15 Wall. (U. S.) 140, 21 L. ed. 119, the court says: "The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate as well as a joint liability. If, through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money loaned to both of them. There a court of equity will enforce the obligation against the representative of a deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill failed to accomplish their object."

[84f] Curtis v. Mansfield, 11 Cush. (Mass.) 152; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Thompson v. Johnson, 40 N. J. L. 220; Potts v. Dounce, 173 N. Y. 335, 66 N. E. 4 (holding that while the statute changes the rule of law it does not affect the procedure).

[84g] McClaskey v. Barr, 79 Fed. 408

must be sued jointly as parties defendant unless they waive the right by not interposing a plea in abatement or provided neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy.[34h] Where an obligation is made to several persons jointly all the obligees must join in an action to enforce it in the absence of any statute changing the rule.[35] The doctrine at common law is that a judgment against one or more of several joint debtors absolutely discharges the others from all liability on the joint contract and bars a

(construing Ohio statutes). Some statutes provide that upon the death of a joint promisor a joint contract is to be treated as a joint and several contract. Philadelphia & R. Coal &c. Co. v. Butler, 181 Mass. 468, 63 N. E. 949. Raney, C. J., in Burgoyne v. Ohio Life Ins. &c. Co., 5 Ohio St. 586, referring to the Ohio statute, said: "This statute affected an entire abrogation of the common-law principle to which allusion has been made, and left the estate of the deceased joint debtor liable to every legal remedy, as fully as though the contract had been joint and several." See also Weil v. Guerin, 42 Ohio St. 299. In Indiana, it has been held that the code of procedure, by abolishing the distinctions between legal and equitable actions, and introducing the equitable doctrines concerning parties, and providing for the severance of the judgment has, without any special provision on this subject, introduced this equitable rule into the law. Daily v. Robinson, 86 Ind. 382; Corbaley v. State, 81 Ind. 62; Eaton v. Burns, 31 Ind. 390; Braxton v. State, 25 Ind. 82.

[34h] Anderson v. Martindale, 1 East 497; Eccleston v. Clipsham, 1 Wm. Saund. 153, note 1; Hopkinson v. Lee, 6 Ad. & El. (N. S.) 964; Foley v. Addenbrooke, 4 Ad. & El. (N. S.) 197; Brower v. Nellis, 6 Ind. App. 323, 33 N. E. 672; Post v. Shafer, 63 Mich. 85, 29 N. W. 519; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Clements v. Miller, 13 N. Dak. 176, 100 N. W. 239. See also McMaster v. City Nat. Bank, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831. Where the contract is not several, nor joint and several, but joint merely, the action on it, if there be two obligors, and both of them living at the time of action brought, must necessarily be a joint action against both. Newman v. Graham, 3 Munf. (Va.) 187. Where a suit is brought against three joint contractors, and the writ is served on two only, the two, by pleading the general issue, waive their right to object to the want of service on the third. Bartlett v. Robbins, 5 Met. (Mass.) 184. Where one of two joint obligors is an infant, a recovery may be had against the other and a discharge as to the infant. Cole v. Manners, 76 Nebr. 454, 107 N. W. 777.

[35] McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Henry v. Mt. Pleasant, 70 Mo. 500; Dewey v. Carey, 60 Mo. 224; Clark v. Cable, 21 Mo. 223; Ohnsorg v. Turner, 33 Mo. App. 486. Nothing is better settled than the

subsequent action against them.[36] Where all the defendants are brought into court, judgment rendered by agreement against one is tantamount to a dismissal as to the others.[37] When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom judgment is recovered being extinguished, their entire liability is gone. They can not be sued separately, for they have incurred no separate obligation; they can not be sued jointly with others, because judgment has already been recovered against the latter, who would otherwise be subjected to two suits for the same cause.[38] Contracts which

rule that, on an undertaking to sue, both must join in an action on it; otherwise there is no cause of action. It is a part of the contract that both shall sue. Rainey v. Smizer, 28 Mo. 310. Compare with Curry v. Kansas & C. P. R. Co., 58 Kans. 6, 48 Pac. 579, in which it is said: "The compensation to be paid for their joint act was to be paid to them separately, and none of them had an interest in the compensation to be paid to the others. 'Where, in a contract, two of the three contracting parties agree to perform certain services for the third, and each of the two is to receive therefor a separate and distinct compensation, it is not necessary that both of them join in a suit for such compensation, but either may maintain a separate action for the amount due him.'" (Quoting from Richey v. Branson, 33 Mo. App. 418.)

[36] Martin v. Baugh, 1 Ind. App. 20, 27 N. E. 110; Cowley v. Patch, 120 Mass. 137; Candee v. Smith, 93 N. Y. 349; Sloo v. Lea, 18 Ohio 279; McMaster v. City Nat. Bank, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831; Smith v. Black, 9 S. & R. (Pa.) 142, 11 Am. Dec. 686; Wooters v. Smith, 56 Texas 198. See generally article by G. C. H. Corliss on "Joint Debtors," 36 Albany Law J. 245.

[37] Henry v. Gibson, 55 Mo. 570. Verdict for a defendant who pleads payment in a suit against him and another on their joint note discharges both. Lenoir v. Moore, 61 Miss. 400. The promisee can not dismiss as to some of the joint obligors and have judgment against the others. Van Leyen v. Wreford, 81 Mich. 606, 45 N. W. 1116.

[38] King v. Hoare, 13 Mees. & W. 494; Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783, overruling Sheehy v. Mandeville, 6 Cranch (U. S.) 253, 3 L. ed. 215; Ward v. Johnson, 13 Mass. 148; McMaster v. City Nat. Bank, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831; Lauer v. Bandow, 48 Wis. 638, 4 N. W. 774; Bowen v. Hastings, 47 Wis. 232, 2 N. W. 301. The decision in the case of Sheehy v. Mandeville, 6 Cranch. (U. S.) 253, 3 L. ed. 215, to the contrary has been distinctly overruled in this country and in England. In Wann v. McNulty, 2 Gilm. (Ill.) 355, 43 Am. Dec. 58, the Supreme Court of Illinois commented upon the case and declined to follow it as authority. Ferrall v. Bradford, 2

are joint and several may be regarded as furnishing two distinct remedies, one by a joint action against all the obligors and the other by a several action against each.[39] The only difference between a contract merely joint and one joint and several, as respects the right of the holder of the one or the other in pursuing his remedy, is, that on the first he is obliged to sue all the living promisors, whereas on the latter he has the right to elect between one and all of them. Having made his election, the contract becomes, so far as the rules of law applicable to his remedy are concerned, purely several or purely joint; and he is no longer at liberty to consider it other than what he has made it by his own determination.[40]

§ 494. Statutory modifications.—Joint contracts, or contracts which would be joint by the common law, are in many

Fla. 508, 50 Am. Dec. 293. "It is the right of persons jointly liable to pay a debt to insist on being sued together. If then there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterward bring a farther action against the third, that third may justly contend that the three should be sued together." By recovering judgment against two in the same cause of action, the creditor has disabled himself from suing the third in the way in which the third has a right to be sued. Kendall v. Hamilton, L. R. 4 App. Cas. 504. The rule here laid down does not apply where the parties are severally as well as jointly bound, and the recovery of a judgment against one is no bar to an action against the other, until the judgment has been satisfied. Bermondsey Vestry v. Ramsey, L. R. 6 C. P. 247.

[39] People v. Harrison, 82 Ill. 84; Cummings v. People, 50 Ill. 132; Melick v. Foster, 64 N. J. L. 394, 45 Atl. 911; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47. In a joint and several contract, the contract is that of each contractor individually, and that of all jointly, and different remedies may be pursued against each. Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783.

[40] Gibbons v. Surber, 4 Blackf. (Ind.) 155. On a joint and several bond, suit may be brought against one of the sureties without joining another with him (Poullain v. Brown, 80 Ga. 27, 5 S. E. 107), and a suit may be brought against a surety without joining the principal. People v. Butler, 74 Mich. 643, 42 N. W. 273. The law appears to be well settled, that if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. United States v. Archer, 1 Wall. Jr. (U. S.) 173, Fed. Cas. No. 14464. The creditor is bound

states declared to be construed as joint and several.[41] Thus it may be provided by statute that, where the parties unite in a promise and receive a benefit from the consideration, their promise is presumed to be joint and several.[42] The statutes of some jurisdictions provide that where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.[43] The rules of the common law, as it prevails in this country and in England, except as the same have been modified by statute, are very strict in requiring service of process upon all the defendants in an action on a demand against joint obligors or partners. If any of the joint defendants were beyond seas, or could not be found, so that it was impossible to reach them by the process of the court, the proper mode thereon was to institute proceedings of outlawry against them, and after a judgment of outlawry had been rendered, the plaintiff could then obtain a

by his election in treating a joint and several contract either as joint or several. Winslow v. Herrick, 9 Mich. 380; United States v. Ames, 99 U. S. 35, 25 L. ed. 295; Benson v. Paine, 9 Abb. Pr. (N. Y.) 28, 2 Hilt. 552, 17 How. Pr. 407; Downey v. Farmers' &c. Bank, 13 Serg. & R. (Pa.) 288.

[41] Cole v. Harvey, 142 Iowa 574, 120 N. W. 97; Rose v. Williams, 5 Kans. 483; Morgan v. Brach, 104 Minn. 247, 116 N. W. 490; Knapp v. Hanley, 153 Mo. App. 169, 132 S. W. 747; McMaster v. City Nat. Bank, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831; Belleville Savings Bank v. Winslow, 30 Fed. 488 (under the Missouri statute providing that "all contracts which, by common law, are joint only, shall be construed to be joint and several"); Wiley v. Holmes, 28 Mo. 286, 75 Am. Dec. 126. Sections of a statute which provided that one action may be brought against any or all of the parties to a joint or several contract, that, for the purposes of suit, every contract entered into by two or more persons shall be considered as joint and several, and that on the death of one of the parties his personal representatives shall be bound to the same extent and in the same manner as if the contract were expressed to be joint and several, have been held to relate only to proceedings, and not to change a joint contract to a several obligation. White v. Connecticut General Life Ins. Co., 34 App. (D. C.) 460.

[42] Bell v. Adams, 150 Cal. 772, 90 Pac. 118 (contract by mine owners to employ one to operate the mines, agreeing to pay him the reasonable value of his services whenever they sold the mines). Cal. Civ. Code, § 1659.

[43] Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26; McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260.

separate judgment against the defendants before the court.[44] Statutes have been passed in most of the states, and in all in which the code system of pleading prevails, which provide that when action is commenced against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more of the defendants, but not on all, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.[45] And a recovery may be had against one defendant alone, in a proper case, notwithstanding another of the debtors has been released by the plaintiff upon a compromise.[46] In most of the states acts called "joint debtor acts" provide that judgment may be given "for or against one or more of several plaintiffs, and for or against one or more of several defendants," and usually contain a provision that "in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."[47] Under these statutes, if a plaintiff commences an action against two or more defendants upon a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.[48]

[44] Edwards v. Carter, 1 Stra. 473; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271.

[45] Bell v. Adams, 150 Cal. 772, 90 Pac. 118; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562n.

[46] Moss v. Jerome, 10 Bosw. (N. Y.) 220.

[47] California Code of Civil Procedure (1899), §§ 578, 579; Arkansas Code (1904), §§ 6229-6230; Iowa Code (1897), § 3773; Wagner Missouri Stat., p. 1019, § 32; New York Code of Civil Procedure (1896), § 1932; Ohio General Code (1910), §§ 11583-4; Wisconsin Code (1898), § 2883; 1 Black on Judgments, § 208.

[48] Richardson v. Jones, 58 Ind. 240. Various effects and consequences are attributed to such judgments in the states in which they are rendered. Longstreet & Sedgwick v. Rea & Co., 52 Ala. 195; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Stafford v. Nutt, 51 Ind. 535; Hubbell v. Woolf, 15 Ind. 204; Eyre v. Cook, 9 Iowa 185; Blodget v. Morris, 14 N. Y. 482; Lampkin v. Chisom, 10 Ohio St. 450; Ah Lep v. Gong Choy, 13 Ore. 205, 9 Pac. 483. A judgment may be entered against any one or more of several defendants wherever a several suit might have been brought, or a several judgment on the facts of the

§ 495. **Liability of partners on firm contracts.**—According to the early law, the liability of a partner for firm debts is joint, and not joint and several. As stated by Mr. Justice Lindley: "An agent who contracts for a known principal is not liable to be himself sued on the contract into which he has avowedly entered only as agent, consequently, a partner who enters into a contract on behalf of his firm is not liable on that contract except as one of the firm; in other words, the contract is not binding on him separately, but only on him and his copartners jointly." There might be such acts or representations by one partner as to make him liable severally, either by express contract or by estoppel, but the general rule was as stated above. The same author also laid down the principle that "there is no difference in this respect between law and equity, except that which arises from the equitable jurisdiction to rectify mistakes and from the principles adopted by courts of equity in administering the estates of deceased partners," and the statement is verified by

case would be proper. Van Ness v. Corkins, 12 Wis. 186; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90. Action was brought against two parties, one of whom was alone served with process. He produced the record of a judgment recovered against himself and his codefendant under the joint debtor act of New York, process in that state having been served upon his codefendant alone. The court said: "We can not, therefore, regard the liability as extinguished. And inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgment at common law, it may be of no great importance whether the action may be brought in form upon the judgment or on the primary debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy." Oakley v. Aspinwall, 4 N. Y. 513. Where the Court of Appeals of New York considered the effect of a judgment recovered under the joint debtor act of that state upon the original demand, Bronson, J., said: "It is said that the original demand was merged in and extinguished by the judgment, and, consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand."

judicial authority.[49] The learned Justice further amplifies this statement, as follows:[50] "It has often been said that in equity partnership debts are separate as well as joint; but this proposition is inaccurate and misleading. It is true that a creditor of a partnership can obtain payment of his debt out of the estate of a deceased partner, but the judgment which such a creditor obtains is quite different from that which a separate creditor is entitled to, and it is a mistake to say that the joint creditor of the firm is also in equity a separate creditor of the deceased partner." It should not be understood that the above rule abridges the liability of a partner individually for firm debts or denied the same, or refused the right to apply in proper cases the partner's individual property to the firm creditors, but implied that where the partner's individual property was held it was simply on account of his interest in the partnership, and his resulting liability for the debts thereof, and not by reason of any several judgment. The question is not so important as regards a partner's liability, which, as shown above, is absolute in proper cases, even for the whole amount of the indebtedness, but as to the manner of enforcing this liability.

§ 496. Further of partnership liability—Modification of rule.—The importance of the distinction may not always therefore be clearly recognized, but is clearly shown, together with later modifications of the old rule, in a Rhode Island case,[51] the court saying: "It is doubtless true that, independently of any statute, the liability of a partnership for the debts thereof is a joint and indivisible liability, and hence that all of the partners must be joined in a suit for the recovery of such debts.[52] At common law, when one of several joint defendants was out of the jurisdiction of the court, so that it was impossible to obtain service upon him,

[49] Kendall v. Hamilton, 4 App. Cas. 504, 3 C. P. Div. 403.

[50] Lindley Partnership, p. 193.

[51] Nathanson v. Spitz, 19 R. I. 70, 31 Atl. 690 (1895).

[52] Dicey, Parties (Truman's Notes), p. 285, rule 56; Bates Partnership, § 1049; Bell v. Donohoe, 17 Fed. 710, 8 Sawy. 435; Page v. Brandt, 18 Ill. 37; Kent v. Holliday, 17 Md. 387; Pearce v. Cooke, 13 R. I. 184.

the plaintiff might institute proceedings of outlawry against such nonresident defendant; and after judgment of outlawry had been obtained against him, the plaintiff could proceed to recover a separate judgment against the defendants served with process.[53] * * * The proceeding of outlawry in civil cases, however, is unknown in the United States; and, if there are any cases of outlawry in criminal cases even, they are very rare." The court then quotes from the opinion of Mr. Justice Bradley in a United States case:[54] "In most of our states legislative acts have been passed, called 'Joint Debtor-Acts,' which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and if the others can not be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and, while they are binding personally on the former, they are regarded as either not personally binding at all or only prima facie binding on the latter." In the case of Mason v. Eldred,[55] a United States case decided in 1867, one Mason sued three partners in Wisconsin, securing service on only one. Upon the trial of the case, the defendant offered in evidence the record of a judgment in a Michigan court, showing that Mason had already brought suit in the Michigan court on the note sued upon in Wisconsin, against the partnership, in which Michigan case only one of the partners (who was not the defendant served in the Wisconsin suit) was served and appeared, and judgment had passed against all the defendants for the full amount due upon the note. The court held this to be no defense, in view of the

[53] 2 Cooley's Bl. Comm., Bk. 3, pp. 281-282.

[54] Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271.

[55] Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783.

Michigan Joint Debtors Act, but further held that under the common law, or in the absence of such statutes the defense would have availed, as the note would have been merged in the judgment. In this opinion Mr. Justice Field made the following clear statement of the rules, which has been quoted in practically every text since written: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements; that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore, it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another, and not with the defendant alone, a plea which would be without meaning if the copartnership contract was the several contract of each copartner. The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was

commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They can not be sued separately, for they have incurred no several obligation; they can not be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause." In a later New York case[56] it is said: "The promise of a copartnership is joint as to all the members and several as to each. * * * Creditors * * * may select any partner and collect their claims wholly from the property of that partner." From the above quotations it is apparent that the courts are not entirely in harmony as to the nature of partnership liability, and still less in harmony as to the name to be applied to such liability, and that law and equity are not altogther as one concerning the nature of the liability of the firm upon its contracts. Ordinarily the law apparently regards it as joint, and not as joint and several.[57] Although there are many cases which

[56] People v. Knapp, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914 B, 243n. But compare Seligman v. Friedlander, 199 N. Y. 373, 92 N. E. 1047, in which it was held that payment could not be exacted from individual property until joint property was exhausted.

[57] "At common law the liability of members of a partnership was joint, and not several." Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677. See further Kendall v. Hamilton, L. R. 4 App. Cas. 504; Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Northern Ins. Co. v. Potter, 63 Cal. 157; Stover v. Stevens, 21 Cal. App. 261, 131 Pac. 332; Erskine v. Russell, 43 Colo. 449, 96 Pac. 249; Currey v. Warrington, 5 Harr. (Del.) 147; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Hyde v. Casey-Grimshaw Marble Co., 82 Ill. App. 83; Crosby v. Jeroloman, 37 Ind. 264; Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Bank of Monroe v. E. C. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255n; Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. 416; Brown v. Fitch, 33 N. J. L. 418; Bowen v. Crow, 16 Nebr. 556, 20 N. W. 850; Batavia First Nat. Bank v. Tarbox, 38 Hun (N. Y.) 57; Huse v. Guyot, 3 Thomp. & C. (N. Y.) 790; Harris v. Schultz, 40 Barb. (N. Y.) 315; Tracy v. Suydam, 30 Barb. (N. Y.) 110; Leake &

held a contrary doctrine, and in some states the later decisions seem to have modified the earlier ones holding such obligations joint.[58] In some states it is provided by legislative enactment that all contracts joint at common law shall be regarded as joint and several. Such statutes have frequently[59] but not invariably

Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80 (affd. 2 Denio 577); Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Haines v. Hollister, 64 N. Y. 1; Meier v. First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907; Gaines v. Therman, 8 Ohio N. P. (N. S.) 521; Cox v. Gille Hardware &c. Co., 8 Okla. 483, 58 Pac. 645; Ryckman v. Manerud, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915 C, 522; North Pacific Lumber Co. v. Spore, 44 Ore. 462, 75 Pac. 890; Nichols v. English, 3 Brewst. (Pa.) 260; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787; Slutts v. Chafee, 48 Wis. 617, 4 N. W. 763. See Brownlee v. Lobenstein (Tenn.), 42 S. W. 467; Byers v. Dobey, 1 H. Bl. 236; Drouin v. Gauthier, 12 Quebec K. B. 442.

[58] "It is the law that the members of a copartnership are personally, jointly, and severally liable for all the indebtedness of the firm." Swing v. Hill, 44 Ind. App. 140, 88 N. E. 721. "It is the certain doctrine of law in this state that every partnership debt and liability is joint and several." Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478; Faulk v. Hobbie Grocery Co., 178 Ala. 254, 59 So. 450; Wood v. Carter, 67 Nebr. 133, 93 N. W. 158. See also Dodson v. Alphin, 88 Ark. 482, 115 S. W. 371; In re Coe, 169 Fed. 1002; De Soto Nat. Bank v. Arcadia Elec. Light &c. Co., 57 Fla. 391, 48 So. 745; Anderson v. Stewart, 108 Md. 340, 70 Atl. 228; Wood v. Carter, 67 Nebr. 133, 93 N. W. 158. And compare Hooks v. Gila Valley Bank &c. Co., 12 Ariz. 315, 100 Pac. 806; Gray v. Rollo, 18 Wall. (U. S.) 629, 21 L. ed. 927; Tucker v. Oxley, 5 Cranch (U. S.) 34, 3 L. ed. 29; Orman v. Potter, 46 Colo. 54, 102 Pac. 893; Metzger v. Manlove, 241 Ill. 113, 89 N. E. 249; Fennell v. Myers, 25 Ky. L. 589, 76 S. W. 136; McCulloh v. Dashiell, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; McGhee v. Montgomery, 85 S. Car. 207, 65 S. E. 721, 67 S. E. 246; Brownlee v. Lobenstein (Tenn.), 42 S. W. 467; Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 Pac. 923.

[59] Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; Williams v. Muthersbaugh, 29 Kans. 730; Putnam v. Ross, 55 Mo. 116; Davis v. Sanderlin, 119 N. Car. 84, 25 S. E. 815; Mahoney-Jones Co. v. Sams Bros., 128 Tenn. 207, 159 S. W. 1094; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939. See also Sherburne v. Hyde, 185 Ill. 580, 57 N. E. 776; Wilson v. Horne, 37 Miss. 477. See Alabama Code 1907, § 2506; Marr v. Southwick, 2 Porter (Ala.) 351; Kirby's Arkansas Stats. 1904, §§ 4420, 4422; Bradford v. Toney, 30 Ark. 763; Connecticut Gen. Stats. 1902, § 655; Rice v. McMartin, 39 Conn. 573; Code District of Columbia, § 1205; White v. Com. Gen. L. Ins. Co., 34 App. (D. C.) 460; Georgia

been held to apply to partnership contracts.[60] Equity, however,

Code 1895, §§ 5014, 5015; Garrard v. Dawson, 49 Ga. 434; Hawaii Revised Laws 1905, §§ 1741, 2658; Re Tai Wo Chau Co., 9 Hawaii 507; Idaho Revised Codes, §§ 4112, 4860; Ind. Burns Stats. 1914, § 2830; Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Iowa Code 1897, §§ 3465, 3468; Streichen v. Fehleisen, 112 Iowa 612, 84 N. W. 715; Kans. Gen. Stats. 1909, § 1641; Kentucky Civ. Code 1906, § 27; Hunt v. Semonin, 79 Ky. 270; Louisiana Code, Act 1870, No. 103, § 2; Saunders Louisiana Rev. Civ. Code, § 2085; Drew v. Bank of Monroe, 125 La. 673, 51 So. 683; Maine Rev. Stat. 1903, ch. 84, § 41; Duly v. Hogan, 60 Maine 351; Massachusetts Rev. Laws 1902, ch. 141, § 8; Sampson v. Shaw, 101 Mass. 145, 3 Am. Dec. 327; Maryland Pub. Gen. Laws, art. 50, §§ 1, 10; Rhodes v. Williams &c. Co., 37 Md. 345; Michigan Compiled Laws, 1897, arts. 9385-10064; Manning v. Williams, 2 Mich. 105; Mason v. Eldred, 6 Wall. (U. S.) 231; Minnesota Rev. Laws 1905, §§ 4482, 4283; Sundberg v. Good, 92 Minn. 143, 99 N. W. 638; Mississippi Code 1906, § 2683; Scharff v. Noble, 67 Miss. 143, 6 So. 843; Missouri Rev. Stats. 1909, §§ 2769, 2772; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673; Montana Rev. Code 1907, §§ 4896, 5048, 5489, which are conflicting; Carlson v. Baker, 36 Mont. 486, 93 Pac. 646; Oklahoma Compiled Laws 1909, §§ 5008, 5619, 5620, 5962; McMasters v. City Nat. Bank of Lawton, 23 Okla. 550, 101 Pac. 1103; New Jersey Gen. Stats., Vol. 2, p. 2336, §§ 2, 3; Harker v. Brinker, 24 N. J. L. 333; United States v. Griefen, 73 N. J. L. 195, 62 Atl. 993; New Mexico Compiled Laws 1897, §§ 2894, 2895, 2943; United States v. Gumm, 9 N. Mex. 611, 58 Pac. 398; North Carolina Revisal 1908, §§ 413, 415; Hansteen v. Johnson, 112 N. Car. 254, 17 S. E. 155; Ohio Gen. Code 1910, § 10733; Weil v. Guerin, 42 Ohio St. 299; Pennsylvania Laws 536, Act April 11, 1848, § 4; Act Mar. 22, 1861 (now following Uniform Partnership Act), Acts 1915, ch. 15, p. 18; Blair v. Wood, 108 Pa. St. 278; Rhode Island Gen. Laws 1909, ch. 283, §§ 17, 18, ch. 185; Providence Sav. Bank v. Vadnais, 25 R. I. 295, 55 Atl. 754; Tennessee Code 1896, § 4486; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15; Sayles Tex. Stats., art. 2071; Gant v. Reed, 24 Tex. 46; Utah Pub. Stats. 1906, §§ 1525, 1527, 1528, 1533; People's Nat. Bank v. Hall, 76 Vt. 280, 56 Atl. 1012; Virginia Code 1904, §§ 2855, 2856, 3396; Lee v. Hassett, 41 W. Va. 368, 23 S. E. 559. Also see following statutes permitting judgment against one partner in action against all. Arizona Rev. Stats. 1906, §§ 1348, 1436; California Civ. Proc. Code, §§ 414, 989; California Civ. Code, § 1543; Florida Gen. Stats. 1906, § 1404; New York Code Civ. Proc., §§ 1932-1941; North Dakota Code Civ. Proc. 1905, § 6847; South Carolina Code Civ. Proc., §§ 157, 2841; Utah Comp. Laws 1907, §§ 2920, 2954, 320; Wisconsin Stats. 1898, §§ 2884, 4204; (now following Uniform Partnership Act), Acts 1915, ch. 358, p. 375.

[60] Thompson v. White, 25 Colo. 226, 54 Pac. 718; Currey v. Warrington, 5 Harr. (Del.) 147; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Cox v. Gille Hardware &c.

has from time to time taken an opposite view of the matter, choosing to make the liability several as well as joint.[61] By the Uniform Partnership Act partners are jointly and severally liable for wrongful acts or breaches of trust chargeable to the partnership and, "jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."[62] Again, as regards this particular phase of the subject, liability may attach separately to the individual partner when he has thus fixed the same by the terms of the contract,[63] or where he has held himself out to the creditor as the one solitary member of the firm.[64] And members of a firm may bind themselves severally as well as jointly by an agreement to that effect.[65] Thus, where a lease is executed by a firm composed of several members, it has been held that the covenants thereto are several as well as joint, and each individual member of the firm is liable thereon.[66] In this connection it seems that in an action by a partner on a note given to him indi-

Co., 8 Okla. 483, 58 Pac. 645; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787.

[61] "It is settled that the liability of the firm and of the individuals composing it was joint and several." United States v. Hughes, 161 Fed. 1021. See further Ladd v. Griswold, 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; Tennessee Valley Bank v. Avery, 9 Ala. App. 363, 63 So. 813; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Silverman v. Chase, 90 Ill. 37; In re Perkins Estate, 166 Mo. App. 170, 148 S. W. 969; Simpson v. Schulte, 21 Mo. App. 639; Edison Elec. Illum. Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Belknap v. Cram, 11 Ohio 411; Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569; Devaynes v. Noble, 1 Meriv. 529. And compare Exchange Bank v. Ford, 7 Colo. 314, 3 Pac. 449.

[62] Uniform Partnership Act, § 15.

[63] Ex parte Harding, L. R. 12 Ch. Div. 557; Konheim v. Meryash, 115 N. Y. S. 96. And compare Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Goddard v. Pratt, 16 Pick. (Mass.) 412; In re Gray's Estate, 111 N. Y. 404, 18 N. E. 719; Haslett's Exrs. v. Wotherspoon, 2 Rich. Eq. (S. Car.) 395.

[64] Bonfield v. Smith, 12 M. & W. 405. And compare Scarf v. Jardine, 7 App. Cas. 345; Crosby v. Jeroloman, 37 Ind. 264.

[65] Forst v. Leonard, 112 Ala. 296, 20 So. 587; McIntyer v. Houseman, 98 Ill. App. 76; Crosby v. Jeroloman, 37 Ind. 264; Amend v. Becker, 37 Misc. 496, 75 N. Y. S. 1095; Perman v. Tunno, Riley Eq. (S. Car.) 181; Denton v. Rodie, 3 Campb. 493.

[66] Dunn v. Jaffray, 36 Kans. 408, 13 Pac. 781.

vidually there can not be a set-off of a partnership debt.[67] And where one partner gives a note to another for the use of the firm, it has been determined that, in an action by the payee, a partnership account against him is not available as a set-off.[68] So, also, where a person purchased, after maturity, a firm note indorsed to one of the partners, the purchaser having no knowledge or notice of the relationship of the indorsee to the firm, it was held in an action by such purchaser that an account between the firm and the partner to whom the note was indorsed was not available as a set-off, it having been declared that though it is a rule that a purchaser after maturity takes a note subject to the defenses and equities existing between the parties to the note, the rule has reference to defenses and equities connected with the instrument.[69] There are two rules as to when the estate of a deceased partner becomes liable in equity on partnership obligations, one holding that it can not be proceeded against unless it appears that the surviving partners are insolvent or the legal remedies against them have been exhausted.[70] The English rule, and that followed by most American courts, is that the creditors of the partnership may proceed in equity immediately against a deceased partner's estate, without resorting to legal remedies against the survivors.[71]

[67] Mitchell v. Sellman, 5 Md. 376. See also Mynderse v. Snook, 1 Lans. (N. Y.) 488.

[68] Anderson v. Robertson, 32 Miss. 241; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673.

[69] Young v. Shriner, 80 Pa. St. 463. Compare Davis v. Briggs, 39 Maine 304.

[70] Pullen v. Whitfield, 55 Ga. 174; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Voorhis v. Childs, 17 N. Y. 354; Sherman v. Kreul, 42 Wis. 33.

[71] Devaynes v. Noble, 1 Mer. 396; Wilkinson v. Henderson, 1 M. & K. 582; Nelson v. Hill, 5 How. (U. S.) 127, 12 L. ed. 81; United States v. Hughes, 161 Fed. 1021; Travis v. Tartt, 8 Ala. 574; McLain v. Carson, 4 Ark. 164, 37 Am. Dec. 777; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Fillyau v. Laverty, 3 Fla. 72; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Freeman v. Stewart, 41 Miss. 138; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189; Wisham v. Lippincott, 9 N. J. Eq. 353; Saunders v. Wilder, 2 Head (Tenn.) 577; Gaut v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Washburn v. Bank of Bellows Falls, 19 Vt. 278.

§ 497. Extent of partnership liability in contract.—Although a partnership obligation is joint, each partner is liable for the entire amount of the obligation of the firm. That is, he can not as to creditors be released by paying a proportion of the debt. A creditor may recover the entire debt from one partner, for each partner individually is liable for all the partnership debts.[72] This is true whatever his share or interest in the partnership, and whether he is an active or a dormant partner, or whether the other partners are or are not solvent and responsible for the debt. The individual property of each partner is as much liable for firm debts as is the firm property. Execution on a judgment against a firm may be levied entirely on the property of one partner, or of some of the partners, disregarding firm assets, and equally disregarding any rights of the partners as between themselves that their property shall be taken in ratable proportion to their interest.[73] "As between the partners themselves the assets are marshaled in equity so that joint assets are first used in the payment of joint debts, and several assets in the payment of several debts. This rule, however, does not bind creditors who may select any partner, and collect their claims wholly from the property of that partner."[74] An agreement between the partners restricting the liability of one to a certain amount is of no effect as to creditors and they may satisfy all firm debts from his property.[75] It has been held, though, that the individual property of an innocent partner can not be attached for a firm debt fraudulently made by another partner.[76] Generally speaking, individual property of a partner who has not been served with process can not be taken, as, usually, no valid

[72] Christian v. Illinois Malleable Iron Co., 92 Ill. App. 320; Hallowell v. Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Benchley v. Chapin, 10 Cush. (Mass.) 173; Nebraska R. Co. v. Lett, 8 Nebr. 251; People v. Knapp, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914 B, 243n; Allen v. Owens, 2 Speers (S. Car.) 170.

[73] Clayton v. May, 68 Ga. 27; Stout v. Baker, 32 Kans. 113, 4 Pac. 141; Randolph v. Daly, 16 N. J. Eq. 313.

[74] People v. Knapp, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914 B, 243n.

[75] Dean v. Phillips, 17 Ind. 406; Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[76] Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645.

judgment can be rendered against him. If a partner is compelled to pay the whole of a firm debt or more than his share, he may require contribution from the other parties, and generally seeks his remedy by accounting in equity.[77] The rule at law as to joint contracts was that on the death of a partner the debts of the partnership became the debts of the survivors and the survivors had in equity the right to say that the copartners could not withdraw the deceased partner's share of property until the firm debts were paid. From this there was a transition to allowing creditors to proceed in a court of equity directly against a deceased partner's estate for firm debts, thus permitting them to assert the equity which the surviving partner's could have asserted. It thus appears that even in equity there is no several liability on a partnership contract until dissolution of a partnership by death.[78]

§ 498. **Commencement and termination of partnership liability.**—Generally, there is no partnership liability until the relation has been established, since the power of each partner to bind the other does not arise before that time, and there is no partnership liability on contracts made individually by one partner before the relationship arose, although the money or goods obtained by such contracts became such partner's[79] contribution to firm capital. An incoming partner entering an established firm is as a rule not liable for debts of the firm prior to his admission unless he assumes such liability by agreement or places himself so that it arises by estoppel.[80] The date of the termina-

[77] See ante § 364, on contribution and ch. 20.

[78] Kendall v. Hamilton, L. R. 4 App. Cas. 504.

[79] Kirby v. McDonald, 70 Fed. 139, 17 C. C. A. 26; Brooke v. Evans, 5 Watts (Pa.) 196; National Bank of Virginia v. Cringan, 91 Va. 347, 21 S. E. 820; Heap v. Dobson, 15 C. B. (N. S.) 460.

[80] Hatchett v. Blanton, 72 Ala. 423; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Bank of Commerce v. Ada County Abstract Co., 11 Idaho 756, 85 Pac. 919; Mellor v. Lawyer, 55 Ill. App. 679; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. 375; Strickler v. Gitchel, 14 Okla. 523, 78 Pac. 94; Wilson v. Tummon, 6 Man. & G. 236.

tion of a retiring partner's liability is governed by the rules of dissolution and will be considered later, but generally, he is liable for acts done until he has in fact withdrawn from the firm and given due notice of withdrawal.[81] By the Uniform Partnership Act a change is made in the ordinary statement of the rule as to the liability of an incoming partner, for it provides that an incoming partner shall be liable for all the partnership obligations arising before his admission as though he had been a partner when such obligations were made, except that this liability shall be satisfied only out of partnership property.[82] This in effect is merely making the firm property liable for debts contracted before the change in the firm.

§ 499. Judgment against or settlement with one partner as releasing all.—As a partnership obligation is a joint obligation, it is the rule that a judgment against one partner on a partnership liability is a bar to a subsequent suit against the remaining members on the same cause of action.[83] But where partnership liability on contract is held to be joint and several, a judgment against one partner on a firm obligation is not a bar to an action on the same cause against other partners, so long as it remains unsatisfied.[84] In the absence of statute it is the rule at common law that an absolute release of one partner from a

[81] See ch. 19 infra.

[82] Uniform Partnership Act, § 17.

[83] Woodworth v. Spafford, 2 McLean (U. S.) 168, Fed. Cas. No. 18020; Fleming v. Ross, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas 314; Thompson v. Emmert, 15 Ill. 415; Wann v. McNulty, 2 Gil. (Ill.) 355, 43 Am. Dec. 58; Crosby v. Jeroloman, 37 Ind. 264; Nicklaus v. Roach, 3 Ind. 78; North v. Mudge, 13 Iowa 496, 81 Am. Dec. 441; Ward v. Johnson, 13 Mass. 148; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; Coles v. McKenna, 80 N. J. L. 48, 76 Atl. 344; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Ryckman v. Manerud, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915 C, 522; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Ex parte Higgins, 3 De G. & J. 33; Kendall v. Hamilton, L. R. 4 App. Cas. 504. Contra: Stoddart v. Van Dyke, 12 Cal. 437; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Union Bank of Georgia v. Hodges, 11 Rich. L. (S. Car.) 480. See generally note 43 L. R. A., pp. 161-184.

[84] Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; McLelland v. Ridgeway, 12 Ala. 482; Daniel v. Bethell, 167 N. Car. 218, 83 S. E. 307. See also Cushing v. Poli, 151 Ill. App. 1.

firm debt discharges his copartners,[85] unless the right is reserved to proceed against the copartners[86] and the common-law rule has been modified by statute in many jurisdictions. The general rule is that where the obligation of one partner, such as a bill or note, is accepted with an agreement to discharge the other part-

[85] Blodgett v. Inglis, 63 Wash. 513, 115 Pac. 1043, Ann. Cas. 1912 D, 622n; Joy v. Wurtz, 2 Wash. C. C. 266, Fed. Cas. No. 7555; Willings v. Consequa, Pet. (C. C.) 301, Fed. Cas. No. 17767; Elliott v. Holbrook, 33 Ala. 659; Gray v. Brown, 22 Ala. 262; Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Bartlett v. McRae, 4 Ala. 688; Drake v. Hill, 53 Iowa 37, 3 N. W. 811, 5 N. W. 745; Seymour v. Butler, 8 Iowa 304; Williamson v. McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561; Finch v. Simon, 61 App. Div. 139, 70 N. Y. S. 361, 32 Civ. Proc. R. 56; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Booth v. Farmers' &c. Nat. Bank, 74 N. Y. 228; Hinton v. Odenheimer, 57 N. Car. 406; Sprague v. Ainsworth, 40 Vt. 47; Dages v. Lee, 20 W. Va. 584; Robinson v. Wilkinson, 3 Price 538. See also McCrillis v. Hawes, 38 Maine 566; Evans v. Carey, 29 Ala. 99; Kendrick v. O'Neil, 48 Ga. 631; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Leggat v. Leggat, 79 App. Div. 141, 80 N. Y. S. 327 (affd. 176 N. Y. 590, 68 N. E. 1119); Hutton v. Eyre, 6 Taunt. 289, 1 E. C. L. 618; Ontario Bank v. O'Reilly, 12 Ont. L. 420.

[86] Paret v. Bryson, 2 West Jur. 351, Fed. Cas. No. 10710; Browning v. Grady, 10 Ala. 999; Pettigrew Machine Co. v. Harmon, 45 Ark. 290; Northern Ins. Co. v. Potter, 63 Cal. 157; Parmelee v. Lawrence, 44 Ill. 405; Gardner v. Baker, 25 Iowa 343; Seymour v. Butler, 8 Iowa 304; Greenwald v. Kaster, 86 Pa. St. 45, 5 Wkly. Notes Cas. 140. Compare Greenwald v. Kaster, 3 Wkly. Notes Cas. (Pa.) 327; Williams v. Hitchings, 10 Lea (Tenn.) 326; Bates v. Wills Point Bank, 11 Tex. Civ. App. 73, 32 S. W. 339; Ex parte Good, L. R. 5 Ch. D. 46; Solly v. Forbes, 2 Brod. & B. 38, 6 E. C. L. 27. Compare Rice v. Webster, 18 Ill. 331; Parmelee v. Lawrence, 44 Ill. 405; Carter v. Connell, 1 Whart. (Pa.) 392; Northern Ins. Co. v. Potter, 63 Cal. 157; Rice v. McMartin, 39 Conn. 573; Davies v. Jones, 61 Kans. 602, 60 Pac. 314; Holdridge v. Farmers' &c. Bank, 16 Mich. 66; Grant v. Holmes, 75 Mo. 109; Harbeck v. Pupin, 123 N. Y. 115, 25 N. E. 311; Hunter v. Hunter, 67 App. Div. 470, 73 N. Y. S. 886; Siefke v. Minden, 40 Misc. 631, 83 N. Y. S. 71; Saxton v. Dodge, 46 How. Pr. (U. S.) 467; Bennett v. Buchan, 53 Barb. 578, 5 Abb. Pr. (N. S.) 412 (revd. 61 N. Y. 222); Commercial Nat. Bank v. Taylor, 64 Hun 499, 19 N. Y. S. 533. See also Beam v. Barnum, 21 Conn. 200; Hatzel v. Moore, 120 Fed. 1015; Finch v. Simon, 61 App. Div. 139, 70 N. Y. S. 361, 32 Civ. Proc. R. 56; Barber v. Davidson, 62 Misc. 552, 115 N. Y. S. 819 (affd. 134 App. Div. 962, 119 N. Y. S. 113); Sprague v. Childs, 16 Ohio St. 107; Greenwald v. Kaster, 86 Pa. St. 45, 5 Wkly. Notes Cas. 140; Abendroth v. Van Dolsen, 131 U. S. 66, 9 S. Ct. 619, 33 L. ed. 57.

ners from liability, they are in fact discharged,[88] unless there is a condition that the debt is not discharged until paid.[89] But in the absence of agreement the acceptance of the obligation of one partner for a firm debt does not, it is generally held, discharge the other partners,[90] although in some states such ac-

[88] Grubbe v. Pierce, 156 Wis. 29, 145 N. W. 207, Ann. Cas. 1915 C, 1199; Sheeley v. Mandeville, 6 Cranch (U. S.) 253, 3 L. ed. 215; Harris v. Lindsay, 4 Wash. (U. S.) 271, Fed. Cas. No. 6124; In re Parker, 11 Fed. 397, 6 Sawy. 248; Usher v. Waddingham, 62 Conn. 412, 26 Atl. 538; Anderson v. Henshaw, 2 Day (Conn.) 272; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317; Lingenfelser v. Simon, 49 Ind. 82; Maxwell v. Day, 45 Ind. 509; Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341; Medberry v. Soper, 17 Kans. 369; Macklin v. Crutcher, 6 Bush (Ky.) 401, 99 Am. Dec. 680; Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; Keerl v. Bridgers, 10 Sm. & M. (Miss.) 612; Leabo v. Goode, 67 Mo. 126; Thompson v. Briggs, 28 N. H. 40; Ludington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601; Gandolfo v. Appleton, 40 N. Y. 533; Waydell v. Luer, 3 Denio (N. Y.) 410; Cole v. Sackett, 1 Hill (N. Y.) 516; Arnold v. Camp, 12 Johns. (N. Y.) 409, 7 Am. Dec. 328; Bank v. Green, 40 Ohio St. 431; Chase v. Brundage, 58 Ohio St. 517, 51 N. E. 31; White v. Rech, 171 Pa. St. 82, 32 Atl. 1130; In re Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Townsend v. Stephenson, 4 Rich. L. (S. Car.) 59; Dages v. Lee, 20 W. Va. 584; Bowyer v. Knapp, 15 W. Va. 277; Reed v. White, 5 Esp. 122; Thompson v. Percival, 5 B. & Ad. 925; Ex parte Hodgkinson, 19 Ves. Jr. 291.

[89] Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390; Claflin v. Ostrom, 54 N. Y. 581; Vernam v. Harris, 1 Hun (N. Y.) 451; Herring v. Sanger, 3 Johns. Cas. (N. Y.) 71; Smith v. Rogers, 17 Johns. (N. Y.) 340.

[90] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Tootle v. Cook, 4 Colo. App. 111, 35 Pac. 193; Fairchild v. Holly, 10 Conn. 474; Dougal v. Cowles, 5 Day (Conn.) 511; Anderson v. Henshaw, 2 Day (Conn.) 272; Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501; Rayburn v. Day, 27 Ill. 46; Tyner v. Stoops, 11 Ind. 22, 71 Am. Dec. 341; Craswell v. Pure Bred Cattle Commission Co., 148 Iowa 9, 126 N. W. 908; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Smith v. Turner, 9 Bush (Ky.) 417; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; Titus v. Todd, 25 N. J. Eq. 458; Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390; Claflin v. Ostrom, 54 N. Y. 581; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Muldon v. Whitlock, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533; Murray v. Governeur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Dobson v. Chambers, 79 N. Car. 142; Leach v. Church, 15 Ohio St. 169; Walker v. Tupper, 152 Pa. St. 1, 25 Atl. 172; Maffet v. Leuckel, 93 Pa. St. 468; Schollenberger v. Seldonridge, 49 Pa. St. 83; Bowers v. Still, 49 Pa. St. 65; Jones v. Johnson, 3 Watts & S. (Pa.) 276,

ceptance raises a prima facie presumption of discharge.[91]

§ 500. Liability of dormant partner.—A dormant partner as heretofore stated, is one who, while a member of the firm, is not known to the world as such, and takes no active part in the management of the firm business. As a rule, he is liable to the firm creditors to the same extent as if he were known to the creditor at the time the credit was obtained, under the doctrine that an undisclosed principal is liable for the acts of his agent. The rule is exactly similar where one partner buys goods for the firm, or otherwise creates a liability for a benefit to it but does not disclose that the act is not his individual act, and the rights of creditors against a dormant partner, or the undisclosed members of a partnership are the same as if they were known.[92] Where there is an undisclosed partnership, with but one ostensible partner, the funds of the visible partner and those belonging

38 Am. Dec. 760; Nightingale v. Chafee, 11 R. I. 609, 23 Am. Rep. 531; White v. Boone, 71 Tex. 712, 12 S. W. 51; Seward v. L'Estrange, 36 Tex. 295; Burdett v. Greer, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019, 129 Am. St. 1014, 15 Ann. Cas. 1087; Hoeflinger v. Wells, 47 Wis. 628, 3 N. W. 589; Bottomley v. Nuttall, 5 C. B. (N. S.) 122; Bedford v. Deakon, 2 B. & Ald. 210; Port Darlington Harbour Co. v. Squair, 18 U. C. Q. B. 533; Carruthers v. Ardagh, 20 Grant Ch. (U. C.) 579.

[91] Springer v. Shirley, 11 Maine 204; Kingman v. Soule, 132 Mass. 285; Chapman v. Durant, 10 Mass. 47; Fowler v. Richardson, 3 Sneed. (Tenn.) 508; Rosseau v. Cull, 14 Vt. 83. See also Maneely v. McGee, 6 Mass. 143, 4 Am. Dec. 105; Connecticut Trust &c. Co. v. Mellendy, 119 Mass. 449; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Torrey v. Baxter, 13 Vt. 452. Compare Pateshall v. Apthorp, Quincy (Mass.) 179, 1 Am. Dec. 3; Paine v. Dwinel, 53 Maine 52, 87 Am. Dec. 533; Ricker v. Adams, 59 Vt. 154, 8 Atl. 278; Spaulding v. Ludlow Woolen Mills, 36 Vt. 150; Stephens v. Thompson, 28 Vt. 77; Robinson v. Hurlburt, 34 Va. 115; Isler v. Baker, 6 Humph. (Tenn.) 85.

[92] McDonald v. Clough, 10 Colo. 59, 14 Pac. 121; Everitt v. Chapman, 6 Conn. 347; Lindsey v. Edmiston, 25 Ill. 359; Gilmore v. Merritt, 62 Ind. 525; Tomlinson v. Collett, 3 Blackf. (Ind.) 436; Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310; Boudreaux v. Martinez, 25 La. Ann. 167; Etheridge v. Binney, 9 Pick. (Mass.) 272; Wood v. Cullen, 13 Minn. 394 (Gil. 365); Bracken v. March, 4 Mo. 74; Arnold v. Morris, 7 Daly (N. Y.) 498; Reynolds v. Cleveland, 4 Cow. (N. Y.) 282, 15 Am. Dec. 369; Poole v. Lewis, 75 N. Car. 417; Franklin v. Hardie, 1 Tex. App. Civ. Cas., § 1219; Cocke v. Upshaw, 6 Munf. (Va.) 464.

to the partnership purporting to be his are, as to innocent creditors, regarded as his sole property and their rights are superior to those of the dormant partner.[93] In a case[94] decided in 1817, the question arose over a dormant partnership in the management of the ship, Lord Eldon, when the dormant partner, one Wilkinson, was unknown to the creditor, Robinson, at the time the debt was contracted, and in fact did not so become known to Robinson until after Robinson had taken a bill drawn by a third person for the debt, which bill proved worthless. Thereafter, upon discovery of the dormant partner, the creditor sued him, and was met by the defense of the payment by the bill as aforesaid. Richards, B., in his opinion, which was concurred in by his associates on the bench, thus expressed himself upon this point: "The question is whether this defendant is discharged by anything that has taken place. Whatever effect any or all of these transactions might have had if Wilkinson had been known to be a partner of Cay, is entirely put out of this case, because the plaintiff certainly dealt entirely with Cay (the ostensible member of the firm), and knew nothing of Wilkinson, who was nevertheless clearly prima facie liable. It is clear law that a dormant partner can not discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner. If it were otherwise and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships." The same rule that a creditor of an undisclosed partnership does not waive or merge his claim against the firm or the undisclosed partners by taking, in ignorance of the existence of the partnership, a negotiable instrument from the ostensible debtor, holds in this country.[95] But some cases

[93] Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Dupuy v. Leavenworth, 17 Cal. 262; White v. Farnham, 99 Maine 100, 58 Atl. 425, 105 Am. St. 261; Lord v. Baldwin, 6 Pick. (Mass.) 348; Gumbel v. Koon, 59 Miss. 264; Callender v. Robinson, 96 Pa. St. 454; Colburn v. Mathews, 1 Strob. (S. Car.) 232.

[94] Robinson v. Wilkinson, 3 Price 538.

[95] Mohawk Nat. Bank v. Van Slyck, 29 Hun (N. Y.) 188 (1883); Winship v. Bank of United States, 5

have denied the liability of the dormant partner on a note given by an ostensible partner individually for goods used by the firm, if the creditor did not know of the relation,[96] and that a silent partner in the business of contracting for carrying the mail, a nontrading partnership, whose members have no implied power to bind each other, is not liable on the contracts made by active partners, unless he authorized or ratified them.[97] In one case[98] it is held that the creditor can not hold the dormant partner, if he withdrew from the firm before the obligation was incurred, even though the dormant partner gave no notice of withdrawal, provided, of course, that the creditor had no previous knowledge of the connection of the dormant partner with the firm. The rights of the partnership creditor against a dormant partner may be briefly summarized as follows: If the dormant partner be completely so, and not known as such to the firm creditor, he will be liable to the firm creditor for indebtedness incurred by the firm to the creditor during the dormant partner's connection with the firm, and notice of his withdrawal from the firm is not necessary.

§ 501. Right of creditor to recover on firm negotiable paper.—The questions connected with the rights of creditors to recover on firm negotiable paper were covered very largely in the preceding chapter on the powers of partners to make ne-

Pet. (U. S.) 529, 8 L. ed. 216; Farnsworth v. Union Trust & Deposit Co., 211 Fed. 912, 128 C. C. A. 290; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Beach v. State Bank, 2 Ind. 488; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; George Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944; Davidson v. Kelly, 1 Md. 492; Graeff v. Hitchman, 5 Watts (Pa.) 454; Watson v. Owens, 1 Rich. L. (S. Car.) 111; Bradshaw v. Apperson, 36 Tex. 133; Pacific Drug Co. v. Hamilton, 71 Wash. 469, 128 Pac. 1069.

[96] Palmer v. Elliott, 1 Cliff. (U. S.) 63, Fed. Cas. No. 10690; Johnson v. Weller, 54 Pa. Super. Ct. 481; De Temple v. Rohrbach, 52 Pa. Super. Ct. 455; George Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944; Moore v. Williams, 26 Tex. Civ. App. 142, 62 S. W. 977.

[97] American Bonding Co. of Baltimore v. Fults, 157 Mo. App. 553, 138 S. W. 689.

[98] Elmira Iron &c. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, 3 Silvernail Ct. App. 351.

gotiable paper, and also the rights of holders in due course were discussed. However, the matter was there treated from the partner's viewpoint, and a brief discussion is here given from the creditor's viewpoint. It is well established that a creditor, holding the negotiable paper of a partnership, although it was issued by one member of the firm, and without the consent of the others, can hold the firm therefor, provided, of course, that the giving of the note or check is within the ostensible scope of the partner's rights under the circumstances, and provided further that the creditor is a bona-fide holder of the paper. The scope of the partnership power is determined by various questions, such as whether the firm is a trading or a nontrading partnership, or the note was given in the usual course of business.[99] The same rule applies where negotiable paper is accepted as where it is drawn, being clearly settled as early as 1797, when Lord Kenyon[1] said: "The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one might bind the rest." There has been no occasion for any change in the above rule since, nor has there been any such change. Likewise does the same principle apply where a partner indorses a negotiable instrument for the firm. "Trading firms have the power to borrow money, and it is one of the incidents of the business, and allied to this is the power to make, draw, accept, and indorse mercantile paper in the usual routine of business, and one member of such firm can ordinarily so bind the firm. Each member of the firm is in law deemed the agent of the firm to issue negotiable commercial paper."[2] It is true that in many instances the rights of creditors and powers of partners appear the same, as in practically every case, where no contrary equities exist the third party can enforce negotiable paper of a firm if the partner giving it had the right to execute it, nevertheless, it

[99] Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53 (1885).

[1] Harrison v. Jackson, 7 D. & E. 207.

[2] Phillips v. Stanzell (Tex. Civ. App.), 28 S. W. 900 (1895).

is also true that there are very many cases where the creditor can collect, even though there was no right or power existing in the partner as between himself and the other partners to issue the paper, and it is with this latter phase of the question that the present discussion deals. It must be remembered that the rule of enforcement of negotiable paper issued by a partnership is subject to the same rules of negotiability as other negotiable paper, so that the creditor under the conditions discussed under this heading, must be a bona-fide holder in order to avail himself of the above mentioned rights, and if he knew of the unauthorized issue, and still took the paper, he took it subject to the equities of the other partners.

§ 502. Actions and other legal measures against partnerships.—Suits may, in many of our states, by statute, be commenced against the firm by its firm name. When not so provided by statute, the individual partners must be sued. This subject will be discussed at length in a later chapter. There are also other legal matters which might be properly discussed under the rights of creditors, but which, owing to a later discussion thereof, will be here omitted, with the statement that creditors do have, with certain restrictions, the rights to secure judgment, to proceed against the firm property or that of the individual partners, to attach property liable, and, in general, to protect his interests against the firm to as full an extent as against individuals and their sureties.[3] As we have heretofore seen, outlawry could formerly, in England, be resorted to by creditors to secure their rights against a firm; but this is not practiced in the United States, and, at the present time, has been abolished in England by statute.[4]

§ 503. Liability in tort—In general.—A principal is responsible for the torts of his agent when such agent is acting within the scope of his authority, hence, each partner being, as to third parties, the agent of his partners while acting within the

[3] See ch. 14.

[4] See ante § 496; Nathanson v. Spitz, 19 R. I. 70, 31 Atl. 690.

scope of his authority, each partner is therefore responsible to third persons for the torts of his copartner when acting within the ordinary course of the firm's business or with such partner's authority.[5] As said in a United States case:[6] "That as a general rule partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business, is familiar doctrine. It rests upon the theory that the contract of partnership constitutes all its members agents for each other, and that when a loss must fall upon one of two innocent parties, he must bear it who has been the occasion of the loss or has enabled a third person to cause it. In other words, the tortious act of the agent is the act of his principals, if done in the course of agency, though not directly authorized. And this is emphatically true where the principals * * * have received and appropriated the benefit of the act." But as to other torts committed by a partner, neither the firm nor the copartners are liable,[7] unless they have assented to or

[5] Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; United States v. Baxter, 46 Fed. 350; Clark v. Ball, 34 Colo. 223, 82 Pac. 529, 2 L. R. A. (N. S.) 100, 114 Am. St. 154; Hobbs v. Chicago Packing &c. Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. 320; Tenney v. Foote, 95 Ill. 99; Haase v. Morton, 138 Iowa 205, 115 N. W. 921, 16 Ann. Cas. 350; Haley v. Case, 142 Mass. 316, 7 N. E. 877; Brown v. Foster, 137 Mich. 35, 100 N. W. 167; Pundmann v. Schoeneich, 144 Mo. 149, 45 S. W. 1112; Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135; Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257; Bostwick v. Champion, 11 Wend. (N. Y.) 571; Towers v. Errington, 78 Misc. 297, 138 N. Y. S. 119; McCarragher v. Gaskell, 42 Hun 451, 6 N. Y. St. 87; Hall v. Younts, 87 N. Car. 285; Boston Foundry Co. v. Whiteman, 31 R. I. 88, 76 Atl. 757, Ann. Cas. 1912 A, 1334n; McEwen v. Shannon, 64 Vt. 583, 25 Atl. 661; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002; Hamlyn v. Houston (1903), 1 K. B. 81; Rhodes v. Moules (1895), 1 Ch. 236; Eager v. Barnes, 31 Beav. 579; Mellor v. Shaw, 1 B. & S. 437. See generally note 51 L. R. A., pp. 463-496.

[6] Stockwell v. United States, 13 Wall. (U. S.) 531, 20 L. ed. 491.

[7] Kilgore v. Shannon, 6 Ala. App. 537, 60 So. 520; Corbett v. Connor, 11 Ga. App. 385, 75 S. E. 492; Frizzell v. Woodman Pub. Co. (Tex. Civ. App.), 130 S. W. 659; Wheless v. Davis (Tex. Civ. App.), 122 S. W. 929. See also Williams v. Hendricks, 115 Ala. 227, 22 So. 439, 41 L. R. A. 650, 67 Am. St. 32; Wolfley v. Brown, 7 Ariz. 157, 62 Pac. 691; Hendricks v. W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835; Durant v. Rogers, 71 Ill. 121, 87 Ill. 508; Sitter v. Kar-

ratified his act.[8] Under the Uniform Partnership Act: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or committing to act."[9]

§ 504. Liability for torts of agents and servants.—Further, partnerships and partners are bound and liable for the tortious acts of their agents or servants acting within the scope of their agency or employment as well as for the acts of each partner acting within the scope of the firm's business,[10] and it is usually held that the members of the firm are individually or jointly and severally liable for such torts of agents and servants, in the same degree as for torts of partners,[11] although some cases hold the partners jointly liable,[12] while some hold the firm only, and not the partners individually,[13] and it is held where an agent of a firm representing himself as the agent of a partner individually, committed a tort, the firm is liable for the tort.[14] In one case it was held that persons who held themselves out as partners so as to warrant the inference that an employé by whom a customer was injured was the employé of a partner-

raher, 100 Ill. App. 669; Gwynn v. Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286; Dounce v. Parsons, 45 N. Y. 180; Tendring Hundred Water Works Co. v. Jones (1903), 2 Ch. 615; Harman v. Johnson, 3 C. & K. 272.

[8] United States v. Baxter, 46 Fed. 350; Durant v. Rogers, 71 Ill. 121; Polykranas v. Krausz, 73 App. Div. 583, 77 N. Y. S. 46; Randall v. Knevals, 27 App. Div. 146, 50 N. Y. S. 748; Cleather v. Twisdere, 28 Ch. D. 340; Petrie v. Lamont, C. & M. 93.

[9] Uniform Partnership Act, § 13.

[10] Roberts v. Totten, 13 Ark. 609; Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Brent v. Davis, 9 Md. 217; McKnight v. Ratcliff, 44 Pa. St. 156; Autrey v. Linn (Tex. Civ. App.), 138 S. W. 197.

[11] Barnett v. State, 54 Ala. 579; Rogers v. Ponet, 21 Cal. App. 577, 132 Pac. 851; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138. Compare Linton v. Hurley, 14 Gray (Mass.) 191.

[12] Cobb v. Abbott, 14 Pick. (Mass.) 289.

[13] Johnston v. Brown, 18 La. Ann. 330.

[14] Marvin v. Wilber, 52 N. Y. 270.

ship, there is joint and several liability of those in control of the premises, without regard to the existence of a partnership.[14a]

§ 505. **Liability of joint tort-feasors—Generally.**—When considering the subject of partnership liability on contract, some time was spent on the general law relating to liability on joint obligations. For a similar reason a quotation is here made from a great text on torts on the general liability of joint wrongdoers, and its difference from the liability of joint contractors.[15] "Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand permits the party injured to treat all concerned in the inquiry as constituting together one party, by their joint co-operation accomplishing certain injurious results, and liable to respond to him in a gross sum as damages. But while the law permits all the wrongdoers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. While the wrong is joint it is also in contemplation of law several; the wrong of one man in beating another is not the less his personal wrong because of a third person having held the assaulted party while another delivered the blows, or because still others stood by, and by force

[14a] Jewison v. Diendonne, 127 Minn. 163, 149 N. W. 20.

[15] Cooley Torts (1st ed.), pp. 132-135.

or threats prevented the intervention of the police. The officer who serves a void writ is not the less an individual wrongdoer because of the magistrate being liable for having issued it. And while in such cases the person injured may pursue all, so he may pursue any number of those who were legally chargeable with the wrong; if one is sued alone, it is no defense to him that others are not brought in to share the responsibility; if all are sued, one can not excuse himself by showing the insignificance of his participation as compared with that of others. The rules regarding remedies which are applicable to breaches of contracts are obviously inapplicable here. When contracts are distinct, though they may be as intimately related as are contracts for the different classes of work on the same building, the breach of both can not be redressed in the same suit, because neither contractor is legally concerned with the conduct of the other, and to unite a controversy with each in one action would only breed confusion and difficulty, since the issues must be distinct, and separate results must be reached in the judgment. On the other hand, if two jointly undertake the work, it is the right of both to be made parties when complaint is made of nonperformance; the other party has accepted their joint undertaking, and he can not elect to separate in his suit those who have not consented to sever in their contract. The case of wrongdoers is wholly different; the party injured has not assented to their action; he has not agreed what the consequences shall be if one or more shall trespass upon his rights, nor is he morally under obligation to pursue his remedy in any particular form because of that form being most to their convenience. Whatever course is seemingly most for his interest, it is just that he should be at liberty to select. Nor, after suit is brought, can there be any apportionment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blameableness as between himself and his associates is immaterial. When the contributory action of all accomplishes a particular result, it is unimportant to the party injured that one contributed much to the injury and an-

other little; the one least guilty is liable for all, because he aided in accomplishing all."

§ 506. Nature of partnership liability in tort.—The liability of partners for torts committed by one partner or a servant is joint and several, not joint, as in case of contract.[16] "In actions ex delicto, generally, and always where a contract is not the gravamen of suit and is merely a matter of inducement or recital, a plaintiff may, at his option, treat the tort committed by two or more persons as either joint or several, and accordingly sue all or any of the tort-feasors; and if one of the wrongdoers be sued alone, as the tort attaches upon each individually, he can not plead the nonjoinder of the others in bar or abate-

[16] Stockwell v. United States, 3 Cliff. (U. S.) 284, Fed. Cas. No. 13466; Williams v. Hendricks, 115 Ala. 227, 22 So. 439, 41 L. R. A. 650, 67 Am. St. 32; Rogers v. Ponet, 21 Cal. App. 577, 132 Pac. 851; Rice v. Van Why, 49 Colo. 7, 111 Pac. 599; Hobbs v. Chicago Packing &c. Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. 320; Liebold v. Green, 69 Ill. App. 527; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355; Haase v. Horton, 138 Iowa 205, 115 N. W. 921, 16 Ann. Cas. 350; Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481; Guarantee Trust &c. Co. v. E. C. Drew Inv. Co., 107 La. 251, 31 So. 736; Birdsall v. Bemiss, 2 La. Ann. 449; Allen v. Leighton, 87 Maine 206, 32 Atl. 877; McCrillis v. Hawes, 38 Maine 566; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914 A, 798; Roberts v. Johnson, 58 N. Y. 613; In re Blackford, 35 App. Div. 330, 54 N. Y. S. 972; Walker v. Anglo-American Mortg. & Trust Co., 72 Hun 334, 25 N. Y. S. 432, 55 N. Y. St. 54; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Barrett v. McCrummen, 128 N. Car. 81, 38 S. E. 286; Mode v. Penland, 93 N. Car. 292; Nisbet v. Patton, 4 Rawle (Pa.) 120, 26 Am. Dec. 122; Boston Foundry Co. v. Whiteman, 31 R. I. 88, 76 Atl. 757, Ann. Cas. 1912 A, 1334; White v. Smith, 12 Rich. L. (S. Car.) 595; Hyrne v. Erwin, 23 S. Car. 226, 55 Am. Rep. 15; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002; Hoxie v. Farmers &c. Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Blyth v. Fladgate (1891), 1 Ch. 337; Moreton v. Hardern, 4 B. & C. 223, 10 E. C. L. 553; Attorney-General v. Burges, Bunb. 223. Compare Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141.

ment, nor give it in evidence under the general issue."[17] Therefore, it is not necessary in bringing an action to join all the partners, but it may be brought against one partner or all or any number less than all.[18] This joint and several liability of joint tort-feasors is not different from the joint and several liability of parties to a contract.[19] And it is held in New York that as the partners are individually liable for the torts of a partner, the holder of a judgment against the firm in tort, may share equally in firm assets with firm creditors and equally in the individual assets of the partners with individual creditors.[20] It seems that if the tort is founded on contract—that is, if it consisted in the breach of a contract either by malfeasance or nonfeasance—all the partners must be sued, as on a partnership contract.[21] Under the Uniform Partnership Act all partners are liable jointly and severally for everything chargeable to the partnership as a wrongful act or breach of trust, jointly for other debts and obligations.[22]

§ 507. Judgment against one partner or release of one partner releases all.—In England a judgment against one or more, but not all, of several joint tort-feasors, even though unsatisfied, is a bar to a subsequent action against the others.[23] But in this country it is usually held that an unsatisfied judgment against less than all of several joint tort-feasors is not a bar

[17] White v. Smith, 12 Rich. L. (S. Car.) 595; Attorney-General v. Burges, Bunb. 223; Govett v. Radnidge, 3 East 62; Sutton v. Clarke, 6 Taunt. 29, 35, 42; Thomas v. Rumsey, 6 Jno. 31.

[18] Howe v. Shaw, 56 Maine 291; McCrillis v. Hawes, 38 Maine 566; Stroher v. Elting, 97 N. Y. 102, 49 Am. Rep. 515; Roberts v. Johnson, 58 N. Y. 613; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Mode v. Penland, 93 N. Car. 292; White v. Smith, 12 Rich. L. (S. Car.) 595; Mitchell v. Tarbutt, 5 T. R. 649.

[19] In re Blackford, 35 App. Div. 330, 54 N. Y. S. 972.

[20] In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914 A, 798.

[21] Walcott v. Canfield, 3 Conn. 194; Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Powell v. Layton, 2 Bos. & Pul. 365; Weall v. King, 12 East 452.

[22] Uniform Partnership Act, §§ 13, 14, 15.

[23] Brinsmead v. Harrison, L. R. 7 C. P. 547.

to a subsequent action against the others.[24] The liability of the firm for torts of one partner is equal in extent to that of the partner who actually committed the wrong.[25] The discharge or release of one partner for a tort releases all the partners from further liability in accordance with the general rules as to joint tort-feasors.[26]

§ 508. Fraudulent misrepresentations.—That all the members of a firm may be held liable to a person for loss occasioned by the fraudulent misrepresentation of one member of the partnership in the sale of partnership property or in the course of partnership business, to the party so damaged is now settled beyond question, and this whether they had any knowledge of, connection with or participation in the act.[27] The reason for the rule is based on agency. "All the partners will be bound by the fraud of one of the partners in contracts relating to the partnership made with innocent third parties. That is to say, all are responsible for the injury occasioned by the fraud, and are liable to an action brought upon the contract or for the recovery of the property fraudulently obtained, whether they were cognizant of the fraud or not. The rule is the same as it is in respect to the responsibility of the principal for the fraud of his agent while acting within the scope of his authority, and indeed a partner becomes liable for the fraud of his copartner because of the relation each bears to the other of agent in the

[24] Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

[25] Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

[26] Story Partnership (5th ed.), § 168, p. 288.

[27] McIlroy v. Adams, 32 Ark. 315; Alexander v. State, 56 Ga. 478; Wolf v. Mills, 56 Ill. 360; Kraft v. Greenough, 175 Ill. App. 124; Beach v. State Bank, 2 Ind. 488; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Doremus v. McCormick, 7 Gill (Md.) 49; Banner v. Schlessinger, 109 Mich. 262, 67 N. W. 116; Monmouth College v. Dockery, 241 Mo. 522, 145 S. W. 785; Wilson-Obear Grocery Co. v. Cole, 26 Mo. App. 5; Nemeth v. Tracy, 159 App. Div. 497, 144 N. Y. S. 901; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Boston Foundry Co. v. Whiteman, 31 R. I. 88, 76 Atl. 757, Ann. Cas. 1912 A, 1334n; Gill v. First Nat. Bank (Tex. Civ. App.), 47 S. W.

partnership business."[28] As said in one typical case:[29] "Defendant was sued as surviving member of the firm of Mellon Bros. for deceit in the sale of horses by such firm to plaintiff. On the trial, plaintiff sought to establish the allegations of the complaint as to fraudulent representations connected with such sale by offering to prove that the member of the firm who was dead at the time of the trial had, in effecting the sale, made certain representations touching the soundness of the horse sold. The evidence was excluded by the trial court, plainly on the ground that one partner is not liable for the fraudulent representations of his copartner in effecting a sale of partnership property. This is not the law, and on principle, ought not to be the law. Although a few courts have taken a different view of the question, there is ample authority to support the rule which renders all the members of the firm liable for the tort of one of its members under such circumstances." The same rule applies to misrepresentations as to the validity of notes, held by a partnership and sold to another party by one of the partners.[30] And as to representations made by one partner concerning the sailing qualities of a vessel,[31] the health of hogs,[32] representations in exchange of lands,[33] the sale of linseed meal inferior to that

751; Reynolds v. Waller, 1 Wash. (Va.) 164; Brydges v. Branfill, 6 Jur. 310, 12 Sim. 369; Norton v. Cooper, 3 Smale. & G. 375. See also Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Strang v. Bradner, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. 1038.

[28] Stewart v. Levy, 36 Cal. 159.

[29] Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209 (1895); Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. ed. 248; Wolfe v. Pugh, 101 Ind. 293; Jewett v. Carter, 132 Mass. 335; Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; 1 Bates Partnership, § 472; Mechem Agency, § 743; Story Partnership, § 108.

[30] French v. Rowe, 15 Iowa 563; Tenney v. Foote, 95 Ill. 99; Nemeth v. Tracy, 159 App. Div. 497, 144 N. Y. S. 901; McKee v. Hamilton, 33 Ohio St. 7.

[31] White v. Sawyer, 16 Gray (Mass.) 586.

[32] Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211.

[33] Kraft v. Greenough, 175 Ill. App. 124; Stanhope v. Swafford, 80 Iowa 45, 45 N. W. 403; Gannon v. Hausaman, 42 Okla. 41, 140 Pac. 407.

represented,[34] the substitution of inferior pelts for those sold,[35] and in one case where one partner made false representations as to the condition of a vessel, and stated that his copartner told him such was the condition, both partners were liable, the copartner not making the representations being liable for his partner's misrepresentations if he had told him of the condition of the vessel, and the partner making the representations being liable for the copartner's misrepresentation if he had told him of the condition.[36] But in order for the rule to apply, and the other partners be held for the misrepresentation of one partner, it must be shown that the misrepresentations were made by the partner, knowing that the inquiries upon which such misrepresentations were made, were made with a view to purchase,[37] and were made by the partner in the course of business.[38] If one partner make a false warranty, within the scope of his authority, on a sale of partnership property, the other partners will also be bound thereby to the purchaser.[39] All the partners may be liable where goods were obtained for firm use by the fraud of one partner, the participation in the use of the goods being a ratification of such fraud; or where, on discovery of the fraud, the other partners fail to repudiate it,[40] and one partner in a firm of real estate and loan brokers is liable for fraud of his absconded partner in inducing one to make a loan, where such partner was held out as having exclusive charge of such part of the business,[41] and it was held the defendant partner's negligence in failing to discover the misdealing offset the negligence of the party who made the loan in failing to require a complete

[34] Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382.

[35] Wolf v. Mills, 56 Ill. 360.

[36] Cook v. Castner, 9 Cush. (Mass.) 266.

[37] In re Schuchardt, 15 Nat. Bankr. Reg. 161.

[38] Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321.

[39] Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211.

[40] Banner v. Schlessinger, 109 Mich. 282, 67 N. W. 116. See also Thomas v. Atherton, 10 Ch. Div. 185; Stewart v. Levy, 36 Cal. 159; Townsend v. Bogart, 11 Abb. Pr. (N. Y.) 355; Blight v. Tobin, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219.

[41] Monmouth College v. Dockery, 241 Mo. 522, 145 S. W. 785.

abstract.[42] As a general rule, though firm obligations were created in fraud of innocent partners, they can not avoid liability unless the other party to the obligation shared in the fraud.[43] However, partners are not liable for fraud committed by a copartner, if not done in the course of the partnership business,[44] unless they authorize or adopt such acts or receive their benefit.[45]

§ 509. **Negligence.**—Is a member of a partnership liable in tort for the negligence of his partner? On the one side it may be answered in the affirmative, owing to the fact that each partner is the agent of the other, and, as such, liable for such a tort if committed by the one partner within the scope of his authority. On the other hand, it has been urged that, if the negligent partner was working as a fellow servant with the person injured, the fellow-servant rule would govern, and would preclude recovery by the person injured against the other partner. This point is answered in an English case,[46] the court saying: "The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow servants engaged in the common employment has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow servants may be supposed

[42] Monmouth College v. Dockery, 241 Mo. 522, 145 S. W. 785.

[43] Seawell v. Payne, 5 La. Ann. 255; Coggswell v. Coggswell (N. J.), 40 Atl. 213; Renton v. Chaplain, 9 N. J. Eq. 62; Sweet v. Morrison, 103 N. Y. 235, 8 N. E. 396; Meyran v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. 806; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

[44] Schwabacker v. Riddle, 84 Ill. 517; Alexander v. State, 56 Ga. 478; Bartles v. Courtney, 6 Ind. Ter. 379, 98 S. W. 133; Andrews v. De Forest, 22 App. Div. 132, 47 N. Y. S. 1011; Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321; Taylor v. Thompson, 176 N. Y. 168, 68 N. E. 240; Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670; Hughes v. Twisden, 55 L. J. Ch. 481, 54 L. T. (N. S.) 570; British Homes Assur. Corp. v. Paterson (1902), 2 Ch. 404, 71 L. J. Ch. 872, 86 L. T. (N. S.) 826, 50 W. R. 612.

[45] Wallace v. James, 5 Grant Ch. (U. C.) 163; Lindmeier v. Monahan, 64 Iowa 24, 19 N. W. 839; Filter v. Meyer, 16 Tex. Civ. App. 235, 41 S. W. 152.

[46] Ashworth v. Stanwix, 3 El. & El. 701, 7 Jur. (N. S.) 467 (1860).

to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman." As a general rule, it may be said that partners are liable for the negligence of their copartners for acts committed within the scope of their partnership authority and for the benefit of the firm.[47] Examples of the application of this rule have arisen where one partner, by negligently driving a partnership coach, injured a third party,[48] where a partner,[49] or an employé of a partnership, running a line of stage-coaches, lost money entrusted to the firm as a carrier;[50] where employés engaged in unloading a vessel were injured by the negligence of a partner in a firm of stevedores, who was superintending the work;[51] where the employé of a blacksmithing firm was injured by the careless act of one partner in throwing a welding compound on a bar which the employé was welding, causing a particle of liquid to strike and injure his eye;[52] where the negligence of one of a partnership of railroad companies injured an employé;[53] where a partnership vessel, through her captain's negligence, damaged a wharf;[54] where a horse borrowed by a partner to use in the firm business was lost by his negligence;[55] where a partner in a firm of butchers negligently left poisonous meat where it was

[47] Myers v. Gilbert, 18 Ala. 467; Mellors v. Shaw, 1 Best & S. 437.

[48] Moreton v. Harden, 4 B. & C. 223.

[49] Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133.

[50] Cobb v. Abbot, 14 Pick. (Mass.) 289.

[51] Linton v. Hurley, 14 Gray (Mass.) 191.

[52] McCarragher v. Gaskell, 42 Hun 451, 6 N. Y. St. 87.

[53] Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. 49.

[54] Steel v. Lester, L. R. 3 C. P. Div. 121.

[55] Witcher v. Brewer, 49 Ala. 119.

eaten by a dog, who died from the effects;[56] where a servant was injured while following negligent directions of one partner;[57] and if there is a holding out of the partnership relation by persons inviting a person to their premises, a person injured from their negligence, they are liable as partners, even if not so in fact.[58] One partner in a firm of druggists is not liable when the other gives to a person a dose of belladonna instead of dandelion, giving away medicine not being within the scope of the firm business.[59] The torts of one partner may be ratified by one or more of his copartners after the act was committed, if the tort was done for the benefit of the firm, and in such a case all so ratifying will be liable to the party injured.[60] Where a physician who is a member of a partnership is guilty of negligence in failing to use a reasonable degree of care, skill and diligence in the conduct of a case, then the negligence of one will be regarded as the negligence of all and all the partners held liable, unless the act complained of was done outside the course and purview of the partnership business.[61] Law partnerships do not differ from other partnerships in the principles governing the liability of the partners,[62] and there can be no doubt that, if a suit at law be unskilfully or negligently conducted by one of the partners, the other members of the firm will be responsible to the injured person in damages.[63] But an attorney receiving a collection as an individual will alone be responsible, although he notifies the client that he is associated with another who attends to the col-

[56] Dudley v. Love, 60 Mo. App. 420.

[57] Haley v. Case, 142 Mass. 316, 7 N. E. 877.

[58] Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20.

[59] Gwynn v. Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286.

[60] Harrison v. Mitchell, 13 La. Ann. 260; Collins v. Waggoner, 1 Ill. 51; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315, 4 Coke Inst. 317.

[61] Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Haase v. Morton, 138 Iowa 205, 115 N. W. 921, 16 Ann. Cas. 350; Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Hyrne v. Erwin, 23 S. Car. 226, 55 Am. Rep. 15; Lee v. Moore (Tex. Civ. App.), 162 S. W. 437.

[62] Livingston v. Cox, 6 Pa. St. 360.

[63] Warner v. Griswold, 8 Wend. (N. Y.) 665; Blyth v. Fladgate (1891), 1

lection of accounts, where the client does not recognize the partnership in the transaction.[64]

§ 510. **Trespass.**—It has been held that each partner is liable for a trespass committed in the course of the partnership business by one of them, such as the seizure of cotton without right,[65] or pulling down a chimney of a tenant,[66] or taking under execution upon a void judgment property of another,[67] or taking property wrongfully upon execution,[68] or cutting timber on another's land,[69] or taking possession of another's meat packing plant, selling food from it to rebels and then burning it.[70]

§ 511. **Conversion.**—A conversion by a person entrusted with goods, may be either negligent or wilful.[71] As a general rule, a conversion by one partner of the property of a third person, done in the ordinary course of the firm's business, makes all the partners liable, whether or not innocent as regards the wrongful act.[72] For "when one partner, in a matter connected

Ch. 337 (liability will extend to estate of deceased partner); Ex parte Selby, 6 DeG., M. & G. 783.

[64] Mardis v. Shackleford, 4 Ala. 493.

[65] Robinson v. Goings, 63 Miss. 500.

[66] Brewing v. Berryman, 15 N. B. 515.

[67] Chambers v. Clearwater, 40 N. Y. (1 Keyes) 310, 1 Abb. Dec. 341.

[68] Brainerd v. Dunning, 30 N. Y. 211.

[69] United States v. Baxter, 46 Fed. 350; Tucker v. Cole, 54 Wis. 539, 11 N. W. 703; Brunswick v. Slowman, 8 C. B. 617, 7 Dowl. & L. 251.

[70] Lucas v. Bruce (Ky.), 4 Am. L. Reg. (N. S.) 95.

[71] Hobbs v. Chicago Packing &c. Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. 320 (1896).

[72] Castle v. Bullard, 23 How. (U. S.) 172, 16 L. ed. 424; Bunn v. Timberlake, 104 Ala. 263, 16 So. 97; Witcher v. Brewer, 49 Ala. 119; McClure v. Hill, 36 Ark. 268; Cunningham v. Woodbridge, 76 Ga. 302; Kerr v. Sharp, 83 Ill. 199; Bane v. Detrick, 52 Ill. 19; Elliott v. Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Jackson v. Todd, 56 Ind. 406, 75 Ind. 272; Bush v. Bush, 33 Kans. 556, 6 Pac. 794; Ryan v. Morrill, 83 Ky. 352, 7 Ky. L. 339; Howe v. Shaw, 56 Maine 291; Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Vanderburgh v. Bassett, 4 Minn. 242 (Gil. 171); Robinson v. Goings, 63 Miss. 500; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; Pundmann v. Schoeneich, 144 Mo. 149, 45 S. W. 1112; Martin v. Moulton, 8 N. H. 504; Galway v. Nordlinger, 51 Hun 639, 4 N. Y. S. 649, 21 N. Y. St. 197; Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593; Nisbet v. Patton, 4 Rawle (Pa.) 120; 26 Am. Dec. 122; Guillon v. Peterson,

with the business of the partnership, does an act to the injury of a third person, which is a tort by construction of law merely, his copartner is equally liable with him for the consequences of his act."[73] "Partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his copartners."[74] However, if the partner when he received the property converted was not acting in the scope of the firm business, then the innocent partners are not liable, and the conversion is held the individual act of the partner.[75] The question of the application of this rule often arises when one partner converts money, of third persons, and if investing money for others is part of the firm business all partners are held liable,[76] as where a member of a law firm collects money for a client and absconds,[77] or a partner in a mercantile firm collects money for a third party and uses it in the firm business,[78] and copartners in a brokerage firm are liable for a conversion of stock by one member.[79] But as such transactions are not within the scope of the firm business, innocent partners are not held liable where one partner in a shipping firm undertook to collect a draft for a third person and converted the money,[80] or one member of a firm of lawyers received money to be invested generally and misappropriated it.[81]

§ 512. **Wilful and malicious torts.**—A somewhat peculiar situation arises when the torts complained of are wilful and malicious on the part of the offending partner. It will be remembered that the wrongful act, in order to give the party in-

89 Pa. St. 163; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424; Tucker v. Cole, 54 Wis. 539, 11 N. W. 703.

[73] Myers v. Gilbert, 18 Ala. 467.

[74] Bane v. Detrick, 52 Ill. 19.

[75] Fox v. Clemmons, 99 S. W. 641, 30 Ky. L. 805; Battle v. Street, 85 Tenn. 282, 2 S. W. 384; Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126; Kinsey v. Archer, 80 Wis. 201, 49 N. W. 962.

[76] Willet v. Chambers, Cowp. 814; Moore v. Knight (1891), 1 Ch. 547.

[77] Dwight v. Simon, 4 La. Ann. 490.

[78] Welker v. Wallace, 31 Ga. 362; Whitaker v. Brown, 16 Wend. (N. Y.) 505.

[79] Kavanaugh v. McIntyre, 74 Misc. 222, 133 N. Y. S. 679.

[80] Toof v. Duncan, 45 Miss. 48.

[81] Harman v. Johnson, 2 El. & Bl. 61. See also Rhodes v. Moules

jured a right of action on account of partnership relation, must have been done (unless by consent or subsequent ratification, in which case the liability arises from other grounds than partnership liability), within the scope of the partnership authority, or at least apparent authority. Hence, as wilful and malicious torts are not within the usual scope of partnership authority, partners will usually be relieved from liability for such acts by their copartner.[82] So, usually, the other partners are not held liable for a malicious prosecution by one partner on a charge of stealing property of the firm, since in bringing about such a prosecution he is performing a duty owing to the community, not to the firm.[83] Nor has a partner implied authority to bind his partners to such acts as detaining and searching a customer whom he suspects of stealing firm property.[84] And in Georgia, where a partnership may be sued in the firm name, in one case a partnership as such was held liable for a malicious prosecution when a prosecution for larceny was begun in furtherance of the firm's interests, and by direct authority of its members, and it was held that express malice may be imputed to a firm as an entity.[85] However, some courts have held that if a wilful or malicious act is committed in the interest of all, and in the usual scope of the business of the firm, as for example, where one member makes actionable remarks about a competitor of the firm, to the advantage of the firm, all the partners will be liable to the party so injured,[86] and this may even apply, in certain

(1895), 1 Ch. 236, and Cleather v. Twisden, 28 Ch. Div. 340.

[82] Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Abraham v. Hall, 59 Ala. 386.

[83] Marks v. Hastings, 101 Ala. 165, 13 So. 297; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; Gilbert v. Emmons, 42 Ill. 143, 89 Am. Dec. 412; Titcomb v. James, 57 Ill. App. 296; Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Farrell v. Friedlander, 63 Hun 254, 18 N. Y. S. 215, 43 N. Y. St. 445. Contra: Staples v. Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

[84] Bernheimer v. Becker, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. 356. See also Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

[85] Page v. Citizens Banking Co., 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. 144.

[86] Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Baldy v. Brackenridge, 39 La. Ann. 660, 2 So. 410; Lothrop v. Adams, 133 Mass.

cases, to the extent of liability to all partners of exemplary or punitive damages.[87]

§ 513. Libel and slander.—Each partner is liable for damages resulting from a defamation made by one partner in aid of the business, for example, slanderous statements about a competitor,[88] or a libelous letter written with respect to firm business.[89] So all partners in a firm which publishes a newspaper are held for a libel printed and published by one,[90] and this is the rule even though there was a malicious intention of the one partner, since the act was done within the scope of the business.[91] As to a slander or libel committed outside the scope of the firm business, none of the partners can be held who did not participate in or authorize its publication.[92] Nor is a partner criminally liable for a libel published without his knowledge or consent,[93] but where he participates he is liable.[94] In Georgia it has been held that an action for slander will not lie against a partnership.[95] A partnership which sells liquor to liquor dealers is not liable for slanderous words uttered by its traveling salesman —as to a firm not a competitor, where the firm neither authorized him to speak so, nor ratified his words.[96]

471, 43 Am. Rep. 528. See also McIlroy v. Adams, 32 Ark. 315; Conely v. Wood, 73 Mich. 203; Lockwood v. Bartlett, 54 Hun 636, 7 N. Y. S. 481, 27 N. Y. St. 93.

[87] Peckham Iron Co. v. Harper, 41 Ohio St. 100; Robinson v. Goings, 63 Miss. 500.

[88] Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Wheless v. Davis (Tex. Civ. App.), 122 S. W. 929.

[89] Burgess v. Patterson, 139 Ky. 547, 106 S. W. 837.

[90] McDonald v. Woodruff, 2 Dill. (U. S.) 244, Fed. Cas. No. 8770; Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 So. 800.

[91] Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528.

[92] Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Blyth v. Fladgate (1891), 1 Ch. 337.

[93] Reg. v. Holbrook, 3 Q. B. D. 60; Reg. v. Holbrook, 4 Q. B. D. 42; Commonwealth v. Rovnianek, 12 Pa. Super. Ct. 86.

[94] Baldwin v. State, 39 Tex. Cr. 245, 45 S. W. 714.

[95] Ozborn v. Woolworth, 106 Ga. 459, 32 S. E. 581; Hendricks v. W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835.

[96] DuQuesne Distributing Company v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481.

§ 514. Torts in collection of debts.—The collection of debts is one of the most important and well established rights of the partnership relation, and if conducted in the usual method employed by the firm or by other persons, it comes within the scope of the partnership business and authority, and if the result is an injury to the debtor for which he has a remedy in tort, he may hold all the partners therefor. It has been held that the demanding and collecting illegal fees by one member of a partnership gives the injured party a right of action against the firm and consequently of suing every member thereof;[97] also that where one member of a firm caused an execution to be levied upon property of the judgment debtor, upon which property there is a chattel mortgage, knowing of the mortgage, but in disregard of it, the firm was held liable for the damage occasioned by such wrongful levy;[98] and likewise where one partner causes goods of a third party to be levied on,[99] or seizes property on a void judgment.[1] In a New Hampshire case,[2] the rule was not carried so far, and was relaxed to this extent, that it was a proper question to submit to the jury as to whether the partner refusing to surrender the goods which, in fact, belonged to a third person, was acting within the proper scope and authority of the partnership business, and it would seem that this were the more equitable rule. If the acting partner secures a compromise with the debtor through fraud or misrepresentation of any kind, the third party will have an action for avoidance of the compromise.[3] It must be remembered, however, that only usual methods of collection must be employed by the partner collecting the debt, in order that the injured party may hold the other members for the tort (in the absence of participation by them, or ratification thereof, or benefit therein).[4] An Illinois case[5] holds that where a debtor

[97] Lockwood v. Bartlett, 54 Hun 636, 7 N. Y. S. 481, 27 N. Y. St. 93.

[98] Harvey v. McAdams, 32 Mich. 472.

[99] Kuhn v. Weil, 73 Mo. 213.

[1] Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657.

[2] Taylor v. Jones, 42 N. H. 25.

[3] Pierce v. Wood, 23 N. H. 519.

[4] Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387.

[5] Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

to the firm is imprisoned by one member of the firm, wrongfully and maliciously, and no benefit having accrued to the firm thereby, the other members of the firm were not thereby, and by reason of their partnership relations, made liable to the injured party. It would appear that the liability, if thrown upon the partnership relations alone, depends upon whether or not the offending partner acted within the scope of the firm business and of his apparent authority, and for the benefit of the partnership.

§ 515. Acts against positive law.—Is a tort, committed by one member of a partnership, and which is against positive law, the subject of firm liability? The decisions upon this point are not unanimous. It has been held in Illinois that "Where a partner, in the course of partnership business, commits a fraud or does acts prohibited by law, the firm is liable, although the other partners have no knowledge of such fraud or illegal act."[6] There are also numerous cases which hold that where one member of a partnership commits acts in violation of the revenue laws, the other members of the firm are liable to the government for such damages and penalties as may accrue thereby.[7] A contrary rule has, however, been applied to this question in two United States cases,[8] both of which require proof of authorization or ratification by the other partners in order to hold them for the acts of their copartner which are in violation of law. And many cases hold that an agency or authority to a partner to violate a statute will not be implied, and that such act is not within the scope of a partnership business which can exist only for lawful purposes.[9]

[6] Tenney v. Foote, 95 Ill. 99. See also Allen v. Leighton, 87 Maine 206, 32 Atl. 877; Bayles v. Newton, 50 N. J. L. 549, 18 Atl. 77 (affd. 51 N. J. L. 553, 19 Atl. 174); Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257; Warner v. Griswold, 8 Wend. (N. Y.) 665; Crumless v. Sturgess, 6 Heisk. (Tenn.) 190; Spokane v. Patterson, 46 Wash. 93, 89 Pac. 402, 8 L. R. A. (N. S.) 1104, 123 Am. St. 921.

[7] United States v. Thomasson, 4 Biss. (U. S.) 99, Fed. Cas. No. 16478; Stockwell v. United States, 13 Wall. (U. S.) 531, 20 L. ed. 491 (smuggling); Graham v. Pocock, L. R. 3 P. C. 345; Attorney-General v. Stranyforth, Bunb. 97.

[8] Graham v. Meyer, 4 Blatchf. (U. S.) 129, Fed. Cas. No. 5673; Schreiber v. Sharpless, 6 Fed. 175.

[9] Marks v. Hastings, 101 Ala. 165, 13 So. 297; Martin v. Simkins, 116

So, where one partner went on the land of another and wilfully cut trees in violation of a statute, the copartner who had not consented and had no knowledge of the act was not liable for the statutory penalty.[10]

§ 516. **Property wrongfully obtained or held.**—As a rule, it matters not whether the offending partner obtains property belonging to another party, or whether he wrongfully retains or applies it. If he acts within the scope of the firm business and for the firm, all the members thereof are liable therefor to the party injured in either event, and this though the other partners were ignorant of the wrong, and entirely innocent of any actual wrongdoing.[11] Mr. Bates, however, in his work on partnership, states that the innocent partners, in a case where the wrongdoing partner obtains the property under such conditions, are not liable in tort, but for money had and received, and this proposition is borne out by a Massachusetts case.[12] In this case the guilty partner forged the names of several persons, as indorsers, upon a note, and negotiated the note, using the proceeds for the benefit of the firm. The court held that all the partners could be sued upon the note, and be liable thereupon, and that the holder need not, under the circumstances wait to sue until the maturity of the note. The money must, however, come into the possession of the partner who wrongfully appropriates it to his own use, where such application is made in a transaction connected with the firm business, if the innocent partners are to be held.[13] The business of the great majority of partnerships does not include the collection of debts for others, and in one case[14] where a partner did not account to a debtor of the firm for the proceeds of a note which the debtor gave this partner to collect for him,

Ga. 254, 42 S. E. 483; Bernheimer v. Becker, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. 356; Hutchins v. Turner, 8 Humph. (Tenn.) 415.

[10] Williams v. Hendricks, 115 Ala. 227, 22 So. 439, 41 L. R. A. 650, 67 Am. St. 32.

[11] Palmer v. Scott, 68 Ala. 380.

[12] Manufacturers' Bank v. Gore, 15 Mass. 15, 8 Am. Dec. 83.

[13] Adams v. Sturges, 55 Ill. 468; Toof v. Duncan, 45 Miss. 48; Dounce v. Parsons, 45 N. Y. 180.

[14] Linn v. Ross, 16 N. J. L. 55.

with instructions either to pay the debtor the amount collected, or to apply the same upon the partnership claim. The partner collected the note and personally retained the amount collected. When the debtor found that it had not been credited to him, he sought to hold the firm liable, but did not prevail in his contention, owing to the application of the above rule. It is true that the wrongdoing partner's connection with the firm gave him the opportunity of perpetrating the fraud, yet the transaction being entirely outside of the partnership business, not accruing to the benefit of the firm, and the other partners being innocent of the wrongdoing, no principle of law or of morals should have held or did hold the other partners. Many of the rules governing partnership liability are artificial, and should not be unduly extended to hold innocent partners for wrongdoing of one partner in such a case as this, and keep the third party free from the results of his own carelessness.

§ 517. **Misapplication of trust funds.**—The subject of the liability of the partnership to third parties for trust funds, held for such third parties by one of the partners and used for the firm, is of great importance, and may be divided into two classes; first, where the partner holding the trust fund first converts it to his own use, and then turns it into the firm as his contribution to the firm capital, and second, where the partner so holding the trust funds simply turns them over directly to the firm and for its benefit, by way of loan or otherwise. In either case, if the money or other trust property is mingled with the other property of the firm, and so used, the other partners can not be held for the misapplication, unless it be shown that the other partners were parties to such misapplication, or had knowledge of the nature of the property so held and disposed of. As Mr. Lindley expresses it: "If one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and therefore to affect the other partners with a breach of trust, further

evidence must be adduced." In a Mississippi case[15] it was stated that the rule is,[16] "generally that a bill can not be maintained against the firm to recover from it the trust fund thus put by the guilty partner, without participation or knowledge on the part of the others, into the assets of the firm." This rule, while not universal in all jurisdictions, is nevertheless very general.[17] If, however, the guilty party gives the cestui que trust the note of the firm for the amount of the trust funds used in the conduct of the firm business, which the trustee advanced, the cestui que trust may enforce the note.[18] In the first classification the above rule probably applies to a greater extent than in the second. In the second, where the trust property comes directly to the firm, if it remains intact, the cestui que trust may follow it into the hands of the firm, and recover it by showing that the firm was not a purchaser for value,[19] while it has been held in some jurisdictions where one partner, at the time of the formation of the firm, contributes trust funds as his contribution to the capital of the firm, that this is, in the absence of knowledge of the other members of the firm that the property so contributed was not his own, analogous to its sale and purchase, and that consequently the property can not be recovered, excepting such part thereof as the partner so contributing could himself have recovered as his own property.[20]

It is not claimed that the above distinction is universal, but it has been made, and with considerable logical grounds. In

[15] Gilruth v. Decell, 72 Miss. 232, 16 So. 250 (1894).

[16] Citing Palmer v. Scott, 68 Ala. 382, and Welker v. Wallace, 31 Ga. 362, to the contrary, and Pickels v. McPherson, 59 Miss. 216, as supporting the rule.

[17] Edwards v. Parker, 88 Ala. 356, 6 So. 684; Harper v. Lamping, 33 Cal. 641; Logan v. Bond, 13 Ga. 192; Englar v. Offutt, 70 Md. 78, 16 Atl. 497, 14 Am. St. 332; Hollemback v. More, 44 N. Y. Super. Ct. 107; Tallmadge v. Penoyer, 35 Barb. (N. Y.) 120; Willett v. Stringer, 17 Abb. Pr. (N. Y.) 152; Guillow v. Peterson, 7 W. N. Cas. (Pa.) 268; Bourdillon v. Roche, 27 L. J. Ch. 681; Sims v. Brutton, 5 Exch. 802.

[18] Richardson v. French, 4 Met. (Mass.) 577.

[19] Carter v. Lipsey, 70 Ga. 417; Renfrow v. Pearce, 68 Ill. 125; Shalu v. Trowbridge, 28 N. J. Eq. 595; Stoddard v. Smith, 11 Ohio St. 581.

[20] Gilruth v. Decell, 72 Miss. 232, 16 So. 250; Hollemback v. More, 44 N. Y. Super. Ct. 107.

almost all cases, moreover, the utmost good faith is required of the other partners, and if they receive the trust property with knowledge of the trust relation, it can be followed into their hands, regardless of the question whether it came under the above mentioned first or second class.[21] An exception to the above statement is made in a federal case,[22] which holds that even where the trustee partner, who is an officer of a bank, loans to his firm funds of the bank, which become mingled with the other partnership property, the bank can not follow and recover the funds, even though the other partners knew of the relation between the banker-partner and the bank. In a case where the trust property must be returned, a delivery to the trustee partner is a valid repayment, unless his authority as trustee has been revoked.[23] All partners have sometimes been held in cases where there was something to make the trust that of the firm, although but one partner dealt with the trust fund.[24] In one or two cases attorneys have been disbarred for misconduct of a member of the firm in misappropriating a client's money,[25] but in most cases where a similar question was presented the contrary was held.[26]

The general rule may perhaps be thus summed up. Trust funds, contributed by a member of a partnership to the firm, can generally be followed by the cestui que trust, if intact, even where they were received without notice of their trust relation, except that in some jurisdictions contributions to firm capital at the time of organization can not be followed as to the interests

[21] Carter v. Lipsey, 70 Ga. 417; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; Trull v. Trull, 13 Allen (Mass.) 407; Price v. Mulford, 36 Hun (N. Y.) 247; Wilson v. Moore, 1 Myl. & K. 127; Willet v. Chambers, Cowp. 814.

[22] Case v. Beauregard, 1 Woods (U. S.) 125, Fed. Cas. No. 2487.

[23] Sherburne v. Goodwin, 44 N. H. 271.

[24] McGill v. McGill, 2 Metc. (Ky.) 258; Porter v. Vance, 14 Lea (Tenn.) 629; Blair v. Bromley, 5 Hare 542; Atkinson v. Mackreth, L. R. 2 Eq. 570; Eager v. Barnes, 31 Beav. 579; Brydges v. Branfill, 12 Sim. 369.

[25] People ex rel v. Betts, 26 Colo. 521, 58 Pac. 1091.

[26] Klingensmith v. Kepler, 41 Ind. 341; Porter v. Vance, 14 Lea (Tenn.) 629; In re McCaughey, 3 Ont. 425.

of the partners other than the trustee. The funds can not ordinarily be followed and recovered if they do not remain intact, in the absence of knowledge of the other partners. The rule disallowing the following of the funds under certain conditions is based upon the grounds that the knowledge of the guilty partner is without the scope of the partnership business, hence is not to be imputed to the other partners, and the same rule applies to the knowledge of the trust relation which is held by other partners, as to any one or more who are innocent of the wrong.[27] Under the Uniform Partnership Act: "The partnership is bound to make good the loss: Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership."[28]

§ 518. Liability of partners under criminal laws.—A partnership can not be indicted criminally, hence a creditor can not hold a partnership liable criminally, but must look to such partners individually as have participated in the crime.[29] That "guilt is personal" is so well established as to be axiomatic, and applies as well to partnership as to other relations, and no one can be punished criminally for criminal acts of his partner, merely by reason of any partnership relation, and in the absence of personal participation therein.[30] A partner is not liable for a penalty because of the act of his copartner in "wilfully and knowingly" cutting the trees of another though done in the course of the partnership business.[31] This rule has not always been applied where the criminal act was an incident of the business, and the publisher of a newspaper has been held

[27] Evans v. Bidleman, 3 Cal. 435.
[28] Uniform Partnership Act, § 14.
[29] Allen v. State, 34 Tex. 230.
[30] Acree v. Commonwealth, 13 Bush (Ky.) 353; Whitton v. State, 37 Miss. 379; State v. Gay, 10 Mo. 440; State v. Coleman, Dudley (S. Car.) 32.
[31] Williams v. Hendricks, 115 Ala. 277, 22 So. 439, 41 L. R. A. 650, 67 Am. St. 32.

criminally as well as civilly liable for a libel published by his copartner.[32] Generally, a partner will not be liable for a wilful act on the part of his copartner outside the course of business, as a wanton assault on a woman.[33] There is also this exception to the general rule that a state or the Federal Government has the power to make partners jointly liable criminally for certain acts committed by one for the benefit of the firm, which has been done in some states as to certain matters, as, for example, violations of revenue laws,[34] or for the unlawful sale of spirituous liquor, in some cases a partner being held guilty without question, if his partner made the sale, even though he was absent at the time or had no knowledge thereof.[35] It is said in other cases that the law will not imply an intent to violate penal laws from an agreement of partnership, and a partner is not liable for a sale by another unless he assented to it in some manner.[36] If, moreover, a partnership is formed and operated for an unlawful and criminal purpose, all the partners who know of the nature of the business can be jointly indicted, not, however, because of the partnership relation, but because of joint participation and guilt.[37] As to creditors' rights under criminal laws, it should be further considered that criminal laws are public rather

[32] Rex v. Waller, 3 Esp. 21.

[33] Titcomb v. James, 57 Ill. App. 296.

[34] United States v. Thomasson, 4 Biss. (U. S.) 99, Fed. Cas. No. 16478; United States v. McGinnis, 1 Abb. (U. S.) 120, Fed. Cas. No. 15678; Commonwealth v. Sloan, 4 Cush. (Mass.) 52; Davis v. Bemis, 40 N. Y. 453; Attorney-General v. Stranyforth, Bunb. 97; Attorney-General v. Burges, Bunb. 223; State v. Gilmore, 80 Vt. 514, 68 Atl. 658, 16 L. R. A. (N. S.) 786n. See also note 33 L. R. A. (N. S.) 419.

[35] Waller v. State, 38 Ark. 656; Robinson v. State, 38 Ark. 641; Phillips v. State, 95 Ga. 478, 20 S. E. 270; Commonwealth v. Cook, 12 Allen (Mass.) 542; Smith v. Adrian, 1 Mich. 495; Gathings v. State, 44 Miss. 343; Whitton v. State, 37 Miss. 379; State v. Neal, 27 N. H. 131; State v. Wiggin, 20 N. H. 449; State v. Scoggins, 107 N. Car. 959, 12 S. E. 59, 10 L. R. A. 542; State v. Simmons, 66 N. Car. 622. See also State v. Sterns, 28 Kans. 154; State v. Wadsworth, 30 Conn. 55; Tracy v. Perry, 5 N. H. 504; Stevens v. State, 14 Ohio 386.

[36] Acree v. Commonwealth, 13 Bush (Ky.) 353.

[37] Stockwell v. United States, 13 Wall. (U. S.) 531, 20 L. ed. 491; United States v. Thomasson, 4 Biss. (U. S.) 99, Fed. Cas. No. 16478; Barrett v. State, 54 Ala. 579; State v. Bierman, 1 Strob. L. (S. Car.) 256.

than private, and that a creditor of a partnership really has no private right excepting, perhaps, in such cases as assault and battery or a few others which in some states can be settled without compounding crime, in a criminal suit to aid him in a civil claim, but, if he starts criminal proceedngs, it is simply as a citizen, in the interest of society, and not as a creditor, seeking a private gain or remedy.

CHAPTER XVII

APPLICATION OF PARTNERSHIP ASSETS

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SECTION

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§ 525. In general.—The subject of the application of partnership assets, upon insolvency, bankruptcy, dissolution, or any occasion when the rights arise of partners and of creditors in firm property generally, as distinguished from specific rights obtained by legal action, is closely allied to the subject of liability to third persons and may properly follow it. Questions as to the proper application of partnership assets have been among the most perplexing ones arising in connection with partnership law, although now certain well-defined rules are recognized in most jurisdictions. It seems to be the intention implied in the creation of a partnership relation, that the property contributed by each partner to the firm for the conduct of the business and that later acquired by it, should first be liable for all debts of the firm. Out of this arises what is known as the partner's lien.

As was said by Mr. Lindley:[1] "In order to discharge himself from the liabilities to which a person may be subject as a partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his copartners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners. This right, lien, quasi-lien, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. * * * Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock in trade for old. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or trustees and does not terminate until his share has been ascertained and provided for by the other partners. But after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock in trade assigned to him as a security for his loan." This right is recognized by the Uniform Partnership Act, providing that when dissolution is caused in any way a partner who has not caused dissolution wrongfully, each partner as against his copartners and all persons claiming through them

[1] Lindley Partnership (8th ed.), p. 413.

in respect of their interest in the partnership, may, unless otherwise agreed, have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing the partners.[2] The Uniform Partnership Act defines partnership assets as the partnership property and the contributions of the partners necessary for the payment of all liabilities to creditors and partners.[3] Out of the right which is the foundation of the so-called partner's lien, arise the rules that a partner, without the consent of the other partners, can not dispose of partnership property to his own use,[4] and the right upon dissolution of a partnership of partnership creditors to a preference over the individual creditors of each partner, this preference being based upon the presumption that such is the wish of each partner implied from his entering into the partnership relation.[5] In this chapter the subject of application of partnership assets,

[2] Uniform Partnership Act, § 38. See also Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Krall v. Crampton, 9 Ben. 218, Fed. Cas. No. 14008; Summers v. Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Leedom v. Ham, 116 Cal. xvi, 48 Pac. 222 (1897); Nelson v. Hayner, 66 Ill. 487; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Crooker v. Crooker, 46 Maine 250; Hamilton v. Harris, 72 Mich. 56, 40 N. W. 56; Freedman v. Holberg, 89 Mo. App. 340; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Martin v. Carlisle (Okla.), 148 Pac. 833; Foster v. Hall, 4 Humph. (Tenn.) 346; Blackwell v. Farmers' &c. Nat. Bank, 97 Tex. 445, 79 S. W. 518; Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481; Stocken v. Dawson, 9 Beav. 239, 50 Eng. Reprint 335; Skipp v. Harwood, 2 Swanst. 586, 36 Eng. Reprint 739; Ex parte Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237; West v. Skip, 1 Ves. 239, 27 Eng. Reprint 1006; Moore v. Riddell, 11 Grant Ch. (U. C.) 69. See for more complete discussion of partners' lien ante § 371.

[3] Uniform Partnership Act, § 40 (a) (b).

[4] See ante § 371, partner's lien.

[5] Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97 (1891); Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242 (1891); Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535 (1889); Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179 (1888); Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350 (1891); Hundley v. Farris, 103 Mo. 78, 15 S. W. 312, 23 Am. St. 863, 12 L. R. A. 254 (1890); Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803 (1887). See discussion in succeeding sections.

both prior to and after dissolution, with reference to the rights of partners, partnership creditors and creditors of individual partners, will be considered, also the rights of partnership creditors in the assets of individual partners.

§ 526. Creditors of partnership have no lien on partnership assets.—The question as to the rights of partnership creditors in the matter of subjecting the partnership property to the payment of their debts has frequently occupied the attention of the courts and while it can not be doubted that firm creditors have, as a general thing, a claim against the partnership for the satisfaction of their debts, it seems that it can not be affirmed that they have an interest in the property corresponding to that created by a specific lien. "On the contrary, it is well settled by the great weight of authority that simple partnership creditors have no specific lien, either legal or equitable, upon the partnership property."[6] In order to obtain a lien on firm property, creditors must acquire it at law in the same manner in which any creditor can secure a lien on his debtor's property, that is, by obtaining a judgment for his debt and levying execution, or by similar proceeding.[7] A few earlier decisions have spoken in terms of creditors having a lien on partnership assets,[8] but such

[6] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191. See also Fairbanks &c. Co. v. Welshans, 55 Nebr. 362, 75 N. W. 865; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Smith v. Smith, 87 Iowa 93, 54 N. W. 73, 43 Am. St. 359; Williams v. Gage, 49 Miss. 777; Level v. Farris, 24 Mo. App. 445; Allen v. Grissom, 90 N. Car. 90; Sigler v. Knox County Bank, 8 Ohio St. 511.

[7] Tracy v. Walker, 1 Flip. (U. S.) 41, 24 Fed. Cas. No. 14129; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Mayer v. Clark, 40 Ala. 259; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Couchman v. Maupin, 78 Ky. 33; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940; Fairbanks &c. Co. v. Welshans, 55 Nebr. 362, 75 N. W. 865; Crippen v. Hudson, 13 N. Y. 161; Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Clement v. Foster, 38 N. Car. 213; Gwin v. Selby, 5 Ohio St. 96; Stahl v. Osmers, 31 Ore. 199, 49 Pac. 958; Woddrop v. Ward, 3 Desaus. (S. Car.) 203; White v. Parish, 20 Tex. 688, 73 Am. Dec. 204; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065.

[8] Sumner v. Hampson, 8 Ohio 328.

use of the term is misleading. Firm creditors have no lien upon partnership property, they have merely an equity or right derived from or through the several members of the firm to have partnership debts satisfied from partnership property.[9] In other words, since each of the partners would have the right to demand the primary application of the firm assets to the payment of partnership obligations, firm creditors will be regarded as possessing a like right.[10] So where a partner waives his lien the

32 Am. Dec. 722; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Washburn v. Bank of Bellows Falls, 19 Vt. 278.

[9] Ex parte Ruffin, 6 Ves. Jr. 119. See cases cited in note 6, preceding section. Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Ladd v. Griswold, 4 Gil. (Ill.) 25, 46 Am. Dec. 443; Johnson v. McClary, 131 Ind. 105, 30 N. E. 888; Merkley v. Gravel Switch Roller Mills Co.'s Assignee, 28 Ky. L. 1010, 90 S. W. 1059; Kimball v. Thompson, 13 Metc. (Mass.) 283; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940; First Nat. Bank v. Brubaker, 128 Iowa 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. 209; In re Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149.

[10] Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530. See also Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899; Lucas v. Atwood, 2 Stew. (Ala.) 378; Jones v. Fletcher, 42 Ark. 422; Hawk Eye Woolen Mills v. Conklin, 26 Iowa 422; Roop v. Herron, 15 Nebr. 73, 17 N. W. 353; In re Stewart, 193 Pa. St. 347, 44 Atl. 434; Himmelreich v. Shaffer, 182 Pa. St. 201, 37 Atl. 1007, 61 Am. St. 698; Bixler v. Kresge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. 920. Compare Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683. "The great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual debts. The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, however, a derivative one only, and not held or enforced in his own right; in other words, 'the equities of the creditors can only be worked out through the equities of the partners.' From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors can not do so. The quasi lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien,

creditor thereby loses his equity.[11] Also, when the partners dispose of their interests in the property, they coincidentally obliterate any right existing in firm creditors to proceed against the same,[12] and the purchase by one partner of the interests of

it of course can not exist after the debtor had himself ceased to have any lien from which it could be derived. The leading case upon this subject is, perhaps, that of Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370, in which it was held that transfers made by the individual members of an insolvent firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore, a complete bar to a bill filed by the partnership creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice Matthews in Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. ed. 211. He says: 'The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtor on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains.'" Stahl v. Osmers, 31 Ore. 199, 49 Pac. 958.

[11] John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823; Farwell v. Cook, 42 Ill. App. 291 (affd. 151 Ill. 239, 37 N. E. 865, 42 Am. St. 237); Sigler v. Knox County Bank, 8 Ohio St. 511; Miller v. Estill, 5 Ohio St. 508, 67 Am. Dec. 305; In re Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; Backus v. Murphy, 39 Pa. St. 397, 80 Am. Dec. 531; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; Royston v. John Spry Lumber Co., 85 Ill. App. 223 (affd. 184 Ill. 539, 56 N. E. 794); Selz v. Mayer, 151 Ind. 422, 51 N. E. 485; Ewart v. Nave-McCord Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Millhiser v. McKinley, 98 Va. 207, 35 S. E. 446.

[12] In re Sauthoff, 8 Biss. (U. S.) 35, Fed. Cas. No. 12380, 16 Nat. Bankr. Reg. 181; Thames v. Schloss, 120 Ala. 470, 24 So. 835; Bartlett v. Meyer Schmidt Grocery Co., 65 Ark. 290, 45 S. W. 1063; Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Franklin Sugar Refining Co. v. Henderson, 86 Md. 452, 38 Atl. 991, 63 Am. St. 524; Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940; Mechanics' Sav. Bank v. Fargeson, 79 Miss. 64, 29 So. 791; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. 596; Rock Island Implement Co. v. Sloan, 83 Mo. App. 438; Werner v. Iler, 54 Nebr. 576, 74 N. W. 833; Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304; Bannister v. Mil-

all copartners deprives the firm creditors of any preference as to firm property over his individual creditors.[13]

§ 527. **Application of assets by partners.**—While a partnership is going and solvent the partners have, if all partners consent, the same power to dispose of firm property as they see fit, which any individual has to dispose of his property, the only limit in either case being that a disposition can not be made fraudulently.[14] So, although a partnership has not enough property to pay its debts, this does not affect its power to convey its

ler, 54 N. J. Eq. 121, 32 Atl. 1066 (affd. 54 N. J. Eq. 701, 37 Atl. 1117); In re Spitz, 8 N. Mex. 622, 45 Pac. 1122, 34 L. R. A. 604; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Consaulus v. McConihe, 49 Hun 609, 17 N. Y. St. 538, 2 N. Y. S. 89 (affd. 119 N. Y. 652, 23 N. E. 1150); Citizens Nat. Bank v. Wehrle, 18 Ohio Cir. Ct. 535, 9 Ohio Cir. Dec. 330; Stahl v. Osmers, 31 Ore. 199, 49 Pac. 958; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Bristol Bank &c. Co. v. Jonesboro Banking &c. Co., 101 Tenn. 545, 48 S. W. 228; De Caussey v. Baily, 57 Tex. 665; Ex parte Mayou, 4 De G., J. & S. 664, 11 Jur. (N. S.) 433.

[13] Hawkins v. Western Nat. Bank of Hereford (Tex. Civ. App.), 146 S. W. 1191; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Ladd v. Griswold, 4 Gil. (Ill.) 25, 46 Am. Dec. 443; Dimon v. Hazard, 32 N. Y. 65; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[14] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191. See also Pierce v. Pass, 1 Porter (Ala.) 232; Coffin v. Day, 34 Fed. 687; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Goudy v. Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; George v. Wamsley, 64 Iowa 175, 20 N. W. 1; Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603; Jones v. Lusk, 2 Metc. (Ky.) 356; Hamilton v. Hodges, 30 La. Ann. 1290; Coakley v. Weil, 47 Md. 277; Heineman v. Hart, 55 Mich. 64, 20 N. W. 792; Hanover Nat. Bank v. Klein, 64 Miss. 141, 8 So. 208, 60 Am. Rep. 47; Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; National Bank v. Sprague, 20 N. J. Eq. 13; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Sigler v. Knox County Bank, 8 Ohio St. 511; Todd v. Lorah, 75 Pa. St. 155; Pepper v. Peck, 17 R. I. 55, 20 Atl. 16; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803; Tompkins v. Woodyard, 5 W. Va. 216.

property and give good title free from a claim of partnership creditors.[15]

§ 528. Application by partners of firm assets to individual debts.—A partnership is not liable for debts of its individual members. However, a solvent firm in full control of its assets has undoubted power with consent of all partners to pay individual debts of one member, and may sell, assign or mortgage firm property for such purpose, if done upon consideration and without intent to hinder, defraud, or delay creditors,[16] or, as said

[15] Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 414, 15 Am. St. 414; Sigler v. Knox County Bank, 8 Ohio St. 511.

[16] See ante §§ 270, 455, Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899 (1887); Goodbar v. Cary, 16 Fed. 316, 4 Woods (U. S.) 663 (1882); In re Lane, 2 Lowell (U. S.) 333, 10 Nat. Bankr. Reg. 135 (1874); Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370 (1879); Coffin v. Day, 34 Fed. 687 (1888); In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. No. 7593, 4 Nat. Bankr. Reg. 378 (1870); Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Pierce v. Pass, 1 Porter (Ala.) 232 (1834); Smith v. Spinnenweber (Ark.), 170 S. W. 84; Embry v. Lewis (Ark.), 18 S. W. 372 (1892); Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124 (1891); Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447 (1889); Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242 (1891); Veal v. The Keely Co., 86 Ga. 130, 12 S. E. 297 (1890); Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372 (1892); Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516 (1868); Keith v. Fink, 47 Ill. 272 (1868); Ladd v. Griswold, 4 Gil. (Ill.) 25, 46 Am. Dec. 443 (1847); Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535 (1889); Goudy v. Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114 (1889); Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179 (1888); Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306 (1887); Jewett v. Meech, 101 Ind. 289 (1884); Kistner v. Sindlinger, 33 Ind. 114 (1870); Dunham v. Hanna, 18 Ind. 270 (1862); Schaeffer v. Fithian, 17 Ind. 463 (1861); Weyer v. Thornburgh, 15 Ind. 124 (1860); Holland v. Fuller, 13 Ind. 195 (1859); Frank v. Peters, 9 Ind. 343 (1857); Case v. Ellis, 4 Ind. App. 224, 30 N. E. 907 (1892); McDonald v. Beach, 2 Blackf. (Ind.) 55 (1827); Smith v. Smith, 87 Iowa 93, 54 N. W. 73, 43 Am. St. 359 (1893); Poole v. Seney, 66 Iowa 502, 24 N. W. 27 (1885); George v. Wamsley, 64 Iowa 175, 20 N. W. 1 (1884); Maquoketa v. Willey, 35 Iowa 323 (1872); Woodmansie v. Holcomb, 34 Kans. 35, 37, 7 Pac. 603 (1885); Jones v. Lusk, 2 Metc. (Ky.) 356 (1859); Hamilton v. Hodges, 30 La. Ann. 1290 (1878); Coakley v. Weil, 47 Md. 277 (1877); Sanderson v. Stockdale, 11 Md. 563, 573 (1857); Heineman v. Hart, 55 Mich. 64, 20 N. W. 792 (1884); Hanover Nat. Bank v. Klein, 64 Miss. 141, 8 So. 208, 60

in some decisions, where enough property remains after the transfer to pay all partnership creditors. And if the partners have consented to such transfer, the consent can not be withdrawn after sale, so as to enable firm creditors to reach the property.[17] If, however, a firm is insolvent or the application of firm property to a debt of an individual member will make it insolvent, the authorities are divided, although the trend of decisions seems to be to hold such transfer valid if made in good faith.[18] Thus, in one case it was held that, even when the firm

Am. Rep. 47 (1886); Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530 (1878); Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350 (1891); Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564 (1888); Tilford v. Ramsey, 37 Mo. 563, 565 (1866); Noble v. Miley, 20 Mo. App. 360 (1866); National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13 (1869); Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992 (1890); Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683 (1873); Ransom v. Vandeventer, 41 Barb. (N. Y.) 307 (1863); Van Bossum v. Walker, 11 Barb. 237 (1851); Burtus v. Tisdall, 4 Barb. (N. Y.) 571 (1848); Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160 (1848); Heye v. Bolles, 33 How. Pr. (N. Y.) 266, 2 Daly 231 (1867); O'Neil v. Salmon, 25 How. Pr. (N. Y.) 246 (1863); Smith v. Howard, 20 How. Pr. (N. Y.) 121 (1859); Wilson v. Robertson, 21 N. Y. 587 (1860), 19 How. Pr. 350; Wilcox v. Kellogg, 11 Ohio St. 394 (1842); Sigler v. Knox County Bank, 8 Ohio St. 511 (1858); Miller v. Estill, 5 Ohio St. 508, 67 Am. Dec. 305 (1856); Todd v. Lorah, 75 Pa. St. 155 (1874); Gallagher v. First Nat. Bank (Pa.), 5 Cent. Rep. 725 (1886); Donnally v. Ryan, 41 Pa. St. 306 (1862); Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124 (1857); Graeff v. Hitchman, 5 Watts (Pa.) 454 (1836); Brooke v. Evans, 5 Watts (Pa.) 196; Noble v. McClintock, 2 Watts & S. (Pa.) 152 (1841); Purdy v. Powers, 6 Pa. St. 492 (1847); Tanner v. Hall, 1 Pa. St. 417 (1845); Pepper v. Peck, 17 R. I. 55, 20 Atl. 16 (1890); Jones' Case, 1 Overt. (Tenn.) 455 (1809); Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803 (1887); Tompkins v. Woodyard, 5 W. Va. 216, 229 (1872); Haben v. Harshaw, 49 Wis. 379, 5 N. W. 872 (1880); In re Caton, 26 U. C. C. P. 308 (1876); Ex parte Peele, 6 Ves. Jr. 602 (1802).

[17] Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Jewett v. Meech, 101 Ind. 289 (1884); Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603; Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530 (1878); Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422 (1891).

[18] Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832; Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370 (1879); Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899 (1886); Teague v. Lindsey, 106 Ala. 266, 17 So. 538

or one of the members thereof is insolvent, a creditor of one of the partners who takes partnership property or the proceeds of the same in payment of his debtor's personal obligation need not account therefor to a creditor of the firm, although he takes with knowledge that the property belonged to the firm as such.[19] The reasoning seems to be that a partnership has the same control over firm property which an individual has over his own property and as an individual, though insolvent, may pay one creditor in full, so a partnership may apply its assets to the valid individual debt of a member. It would seem, though, that no consideration passes to the partnership for such an application of assets to an individual debt, that is in effect a gift to one partner and therefore such transaction might be void as to creditors because without consideration.[20] And many cases have held it a fraud on firm creditors for a firm which is insolvent or will become insolvent by the transfer, to apply firm property to the payment of one partner's individual debt.[21]

(1895); Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242 (1891); Wallace v. Steagall, 52 Ill. App. 471; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535 (1889); Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179 (1881); Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306 (1887); Warren v. Farmer, 100 Ind. 593; Trentman v. Swartzell, 85 Ind. 443; Smith v. Smith, 87 Iowa 93, 54 N. W. 73, 43 Am. St. 359 (1893); Kincaid v. National Wall-Paper Co., 63 Kans. 288, 65 Pac. 247, 54 L. R. A. 412, 88 Am. St. 243; Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603 (1885); Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213, 60 S. W. 87; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681 (1894); Seger's Sons v. Thomas Bros., 107 Mo. 635, 18 S. W. 33; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; Hundley v. Farris, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. 863; First Nat. Bank v. Brenneisen, 97 Mo. 145, 10 S. W. 884; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564; Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378; Pepper v. Peck, 17 R. I. 55, 20 Atl. 16 (1890); Bedford v. McDonald, 102 Tenn. 358, 52 S. W. 157; Marks v. Hill, 15 Grat. (Va.) 400; Day v. Wetherby, 29 Wis. 363.

[19] First Nat. Bank v. Brubaker, 128 Iowa 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. 209.

[20] Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Wilson v. Robertson, 21 N. Y. 587, 19 How. Pr. 350.

[21] Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Goodbar v. Cary, 4 Woods 663, 16 Fed. 316; Goetter v. Norman, 107 Ala. 585, 19 So. 56; Hill v. Draper, 58

§ 529. Mortgage of firm property by partners.—A partnership has power to mortgage its property to secure firm debts.[22] A mortgage otherwise valid of firm property to secure a firm debt made by one partner or by all, may not be attached by other creditors of the firm because the mortgagees are preferred over them.[23] The lien of such mortgagee is superior to that of judgment creditors of individual partners.[24] A mortgage of a partner's interest in partnership property to secure debts owed by him individually is subject to the claim of firm creditors, since this mortgage can pass only the partner's share in the assets after firm debts are paid and partnership accounts are adjusted.[25] But

Ark. 625, 24 S. W. 1075 (1894); Cron v. Cron, 56 Mich. 8, 22 N. W. 94; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. 596; Caldwell v. Bloomington Mfg. Co., 17 Nebr. 489, 23 N. W. 336; Ferson v. Monroe, 21 N. H. 462; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Clements v. Jessup, 36 N. J. Eq. 569; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. 414; Ransom v. Vandeventer, 41 Barb. (N. Y.) 307 (1863); Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683 (1873); Wilson v. Robertson, 21 N. Y. 587, 19 How. Pr. 350 (1860); Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939; Kurner v. O'Neil, 39 W. Va. 515, 20 S. E. 589 (1894); Snyder v. Lunsford, 9 W. Va. 223 (obiter); Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422 (1891); Ex parte Snowball, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. (N. S.) 894, 20 Wkly. Rep. 786.

[22] See §§ 301-304, 440-442.

[23] Kiser v. Carrolton Dry Goods Co., 96 Ga. 760, 22 S. E. 303; Smith v. Smith (Iowa), 50 N. W. 64 (1891); Letts-Fletcher Co. v. McMaster, 83 Iowa 449, 49 N. W. 1035; Miami County Nat. Bank v. Barkalow, 53 Kans. 68, 35 Pac. 796; Walker v. White, 60 Mich. 427, 27 N. W. 554; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939; Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422.

[24] Morton v. Higgins, 7 N. J. L. 343; Huggins v. White, 7 Tex. Civ. App. 563, 27 S. W. 1066.

[25] Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Embry v. Lewis (Ark.), 18 S. W. 372 (1892); Jones v. Parsons, 25 Cal. 100; Chase v. Steel, 9 Cal. 64; Shaw v. McDonald, 21 Ga. 395; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Lewis v. Harrison, 81 Ind. 278; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84; Fargo v. Ames, 45 Iowa 491; Aldridge v. Elerick, 1 Kans. App. 306, 41 Pac. 199; Bank of Kentucky v. Herndon, 1 Bush (Ky.) 359, 89 Am. Dec. 630; Thompson v. Spittle, 102 Mass. 207; Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146; Churchill v. Proctor, 31 Minn. 129, 16 N. W. 694; Ewart v. Nave-McCord Mercantile Co., 130

where firm real estate, title to which was in the name of one partner, was mortgaged to one who had no notice of the firm's ownership, to secure a partner's individual debt, such mortgagee's rights are prior to those of firm creditors.[26] Firm property may be mortgaged to one partner and the mortgage is not invalid because of the relationship,[27] although such fact may tend to bear upon the question whether the mortgage was fraudulent.[28] Such mortgage is inferior to the rights of firm creditors.[29] There is no doubt that a solvent partnership may mortgage, assign or use its property to secure one member's debt,[30] the mere preference, by a mortgage, of individual debts over partnership debts not being such a fraud on firm creditors that a court of equity will

Mo. 112, 31 S. W. 1041; Lovejoy v. Bowers, 11 N. H. 404; Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; Barber v. Palmer, 70 Hun 498, 24 N. Y. S. 451, 53 N. Y. St. 753; Ruhl v. Phillips, 2 Daly 45 (revd. on other grounds in 48 N. Y. 125, 8 Am. Rep. 522); Ivie v. Blum, 159 N. Car. 121, 74 S. E. 807; Strauss v. Frederick, 91 N. Car. 121; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; McDermot v. Laurence, 7 Serg. & R. (Pa.) 438, 10 Am. Dec. 468; Patterson v. Atkinson, 20 R. I. 102, 37 Atl. 532; Rose v. Izard, 7 S. Car. 442; Fort Worth Nat. Bank v. Daugherty, 81 Tex. 301, 16 S. W. 1028; Johnston v. Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580; Stebbins v. Willard, 53 Vt. 665; Jones v. Neale, 2 Pat. & H. (Va.) 339; Cunningham v. Ward, 30 W. Va. 572, 5 S. E. 646.

[26] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Reeves v. Ayers, 38 Ill. 418; Seeley v. Mitchell, 85 Ky. 508, 4 S. W. 190, 9 Ky. L. 86; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. Compare Hiscock v. Phelps, 49 N. Y. 97.

[27] Ricketts v. Croom, 102 Ala. 332, 14 So. 637; Waterman v. Hunt, 2 R. I. 298; Howell Bros. Shoe Co. v. Mars, 82 Tex. 493, 17 S. W. 370.

[28] Curtis v. Wilcox, 91 Mich. 229, 51 N. W. 992; Strong v. Hines, 35 Miss. 201; Heilbronner v. Lloyd, 17 Mont. 299, 42 Pac. 853; Taylor v. Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466.

[29] Ricketts v. Croom, 102 Ala. 332, 14 So. 637; Monroe v. Hamilton, 60 Ala. 226; Taylor v. Watts, 20 S. W. 388, 14 Ky. L. 451; Parish v. Phillips, 1 Mart. (O. S.) (La.) 96; Irwin v. Bidwell, 72 Pa. St. 244.

[30] Woodmansie v. Holcomb, 34 Kans. 35, 7 Pac. 603; Jones v. Lusk, 2 Metc. (Ky.) 356; Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530; McDonald v. Cash, 45 Mo. App. 66; Wilson v. Gamble, 50 Nebr. 426, 69 N. W. 945; Miller v. Gunderson, 48 Nebr. 715, 67 N. W. 769; Bingham v. Tuttle, 82 Hun 51, 31 N. Y. S. 68, 63 N. Y. St. 367; Nill v. Chidester, 52 Hun 612, 25 N. Y. St. 1036, 6 N. Y. S. 332. See also McKinney v. Rosenband, 23 Fed. 785, 23 Blatchf. 235; Goodbar v. Cary, 16 Fed. 316, 4 Woods (U. S.) 663; Citizens' Bank v. Williams, 128 N. Y. 77, 28 N. E.

set the mortgage aside.[31] Such mortgage of itself constitutes a waiver of the rule, established for the benefit of the partners themselves, whereby firm debts are accorded a preference in the matter of payment out of the partnership property.[32] Such a preference of individual creditors when the partnership is insolvent, and this fact is known to the mortgagee, may, however, render the mortgage void as against firm creditors.[33] And probably the greater number of cases hold such a use of firm property valid, even though the firm was insolvent, when there was no intent to defraud.[34] The failure to record a mortgage prior to a purchase by third persons will leave the mortgagee in

33, 26 Am. St. 454; Larzelere v. Tiel, 3 Pa. Super. Ct. 109, 39 Wkly. Notes Cas. 320.

[31] Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13 (revd. 21 N. J. Eq. 530); Kennedy v. National Union Bank, 23 Hun (N. Y.) 494.

[32] Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. No. 7593; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[33] Cribb v. Morse, 77 Wis. 322, 46 N. W. 126; Keith v. Fink, 47 Ill. 272; Heineman v. Hart, 55 Mich. 64, 20 N. W. 792; Rothell v. Grimes, 22 Nebr. 526, 35 N. W. 392; Ferson v. Monroe, 21 N. H. 462; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066; Ransom v. Vandeventer, 41 Barb. (N. Y.) 307; Lester v. Pollock, 26 N. Y. Super. Ct. 691; In re Petze, 26 Misc. 72, 56 N. Y. S. 482; Snyder v. Lunsford, 9 W. Va. 223; Cribb v. Morse, 77 Wis. 322, 46 N. W. 126; Young v. Keighly, 15 Ves. Jur. 557, 33 Eng. Reprint 865.

[34] Coffin v. Day, 34 Fed. 687; In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. No. 7593, 4 Nat. Bankr. Reg. 378; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124; Rouss v. Wallace, 10 Colo. App. 93, 50 Pac. 366; Ellison v. Lucas, 87 Ga. 223, 13 S. E. 445, 27 Am. St. 242; Evansville Old Nat. Bank v. Heckman, 148 Ind. 490, 47 N. E. 953; Farwell v. Stick, 96 Iowa 87, 61 N. W. 565, 64 N. W. 614; Myers v. Tyson, 2 Kans. App. 464, 43 Pac. 91; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681 (1893) (revg. 47 Mo. App. 307, and overruling Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378); Potts v. Blackwell, 57 N. Car. 58; Sigler v. Knox County Bank, 8 Ohio St. 511; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803 (distinguishing Buck Stove Co. v. Johnson, 7 Lea 282; Barcroft v. Snodgrass, 1 Coldw. 430); Batchelor v. Sanger, 15 Tex. Civ. App. 110, 38 S. W. 359; Marks v. Hill, 15 Grat. (Va.) 400; Vietor v. Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

the position of a simple firm creditor.[35] As has been stated, partnership creditors have no lien on the property of the partnership if the partners themselves have none.[36]

§ 530. Assignment by partners for benefit of creditors.—Generally speaking, unless it is contrary to statute, the members of a partnership may assign for the benefit of partnership creditors with preferences part or all of the partnership property.[37] However, the preference of individual creditors of partners is held a fraud on firm creditors.[38] In some states an assignment by partners of all the partnership property for the benefit of creditors is required by statute to include the individual property of the partners, in order to be valid.[39] In other states it is not required that such assignments carry with them the individual property of the partners.[40] An assignment by a partnership need

[35] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191.

[36] Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803. See Jones Liens (2d ed.), § 788.

[37] Harmon v. McRae, 91 Ala. 401, 8 So. 548; Stroff v. Swafford, 81 Iowa 695, 47 N. W. 1023; Hill v. B. M. Creel Co., 18 Ky. L. 132, 35 S. W. 537; Dispatch Printing Co. v. George, 83 Minn. 309, 86 N. W. 339; Campbell v. Farmers' &c. Bank, 49 Nebr. 143, 68 N. W. 344; Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304; Citizens' Nat. Bank v. Riddell, 50 Hun 600, 2 N. Y. S. 331, 18 N. Y. St. 471; George v. Grant, 28 Hun 69 (affd. 97 N. Y. 262); Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33; Vietor v. Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; Ball v. Tennant, 25 Ont. 50 (revd. on other grounds in 21 Ont. App. 602).

[38] Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Murray v. Gerety, 11 N. Y. S. 205, 25 Abb. N. C. 161, 32 N. Y. St. 240; Burhans v. Kelly, 49 Hun 610, 2 N. Y. S. 175, 17 N. Y. St. 552.

[39] Kennedy v. McKee, 142 U. S. 606, 12 Sup. Ct. 303, 35 L. ed. 1131; Swofford Bros. Dry-Goods Co. v. Mills, 86 Fed. 556; Sheppard v. Reeves, 39 Fla. 53, 21 So. 774; Williams v. Crocker, 36 Fla. 61, 18 So. 52; Simmons v. Curtis, 41 Maine 373; Maughlin v. Tyler, 47 Md. 545; Wyles v. Beals, 1 Gray (Mass.) 233; Farwell v. Brooks, 65 Minn. 184; In re Allen, 41 Minn. 430, 43 N. W. 382; May v. Walker, 35 Minn. 194, 28 N. W. 252; Derry Bank v. Davis, 44 N. H. 548; In re Wilson, 4 Pa. St. 430, 45 Am. Dec. 701; Focke v. Blum, 82 Tex. 436, 17 S. W. 770; Still v. Focke, 66 Tex. 715, 2 S. W. 59; McCord Brady Co. v. Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

[40] Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; Ex parte Hopkins, 104 Ind. 157, 2 N.

not include the debts of individual partners.[41] The reason for the distinction seems to be that in states where releases are required of creditors, all the property liable to the payment of debts, which, in case of a partnership, includes the individual property of the partners, must be turned over by the assignment,[42] especially if individual property of the partners is not included.[43] Generally, one partner may transfer firm property to pay a firm debt, even though the result is to prefer one creditor,[44] but general assignment for benefit of creditors by one partner is not valid, unless the other partners consent,[45] except in extraordinary cases where the other partners can not be quickly reached.[46]

§ 531. Transfer of partnership property to partner or new firm.—If all the property of a partnership is transferred by a valid sale to one partner or to another firm in which some of the old partners are members, this destroys the partner's lien, and consequently the right of the creditors of the old partnership to a preference over the individual creditors of the purchaser.[47] If the consideration for the transfer is the assumption

E. 587; Blake v. Faulkner, 18 Ind. 47; McFarland v. Bate, 45 Kans. 1, 25 Pac. 238, 10 L. R. A. 521.

[41] Johnston v. Dunn (N. J.), 29 Atl. 361; Armstrong v. Hurst, 39 S. Car. 498, 18 S. E. 150; Trumbo v. Hamel, 29 S. Car. 520, 8 S. E. 83; Wilson v. Sullivan, 17 Utah 341, 53 Pac. 994; Auley v. Osterman, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

[42] Swofford Bros. Dry-Goods Co. v. Mills, 86 Fed. 556; Bradley v. Bischel, 81 Iowa 80, 46 N. W. 755; McFarland v. Bate, 45 Kans. 1, 25 Pac. 238, 10 L. R. A. 521; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. 443; Haggerty v. Granger, 15 How. Pr. (N. Y.) 243; Blair v. Black, 31 S. Car. 346, 9 S. E. 1033, 17 Am. St. 30; Goddard v. Bridgman, 25 Vt. 351, 60 Am. Dec. 272; Willis v. Bremner, 60 Wis. 622, 19 N. W. 403; Vernon v. Upson, 60 Wis. 418, 19 N. W. 400.

[43] Heckman v. Messinger, 49 Pa. St. 465; Mills v. Kerr, 7 Ont. App. 769.

[44] See ante § 444.

[45] See ante § 458; Loeb v. Pierpont, 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122; Shattuck v. Chandler, 40 Kans. 516, 20 Pac. 225, 10 Am. St. 227; Gates v. Andrews, 37 N. Y. 657, 97 Am. Dec. 764; H. B. Clafflin Co. v. Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. 686; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

[46] See cases cited in preceding note.

[47] Ball v. Danton, 64 Ore. 184, 129 Pac. 1032; Johnston v. Straus, 26 Fed. 57; Shimer v. Huber, Fed. Cas.

of the firm debts and both firm and purchaser are solvent, the purchaser takes the property free of any lien for firm debts.[48] But if the purchasing partner agreed to apply the assets to the payment of firm debts, or the sellers have otherwise retained the right to have the firm assets applied to firm debts, then, in equity, that right can be asserted by creditors of the old firm, and its assets will still be treated as partnership assets.[49] It has often been held that even if the firm is not solvent, such a transfer in good faith for a valid consideration, destroys the preference of firm creditors in the property.[50] In some cases it has

No. 12787, 19 Nat. Bankr. Reg. 414, 14 Phila. (Pa.) 402; Rose v. Gunn, 79 Ala. 411; Mayer v. Clark, 40 Ala. 259; Jones v. Fletcher, 42 Ark. 422; Brown v. Miller, 11 Colo. 431, 18 Pac. 617; Schleicher v. Walker, 28 Fla. 680, 10 So. 33; Hanford v. Prouty, 133 Ill. 339, 24 N. E. 565; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Rosenstiel v. Gray, 112 Ill. 282; Kincaid v. National Wall-Paper Co., 63 Kans. 288, 65 Pac. 247, 54 L. R. A. 412, 88 Am. St. 243; Topliff v. Vail, Harr. (Mich.) 340; Fulton v. Hughes, 63 Miss. 61; Norris v. Rumsey, 54 Mo. App. 143; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Sage v. Chollar, 21 Barb. (N. Y.) 596; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480, 45 Am. Dec. 412; Robb v. Stevens, 1 Clarke Ch. (N. Y.) 191; Latham v. Skinner, 62 N. Car. 292; Mortley v. Flanagan, 38 Ohio St. 401; Willis v. Thompson, 85 Tex. 301, 20 S. W. 155; Ex parte Ruffin, 6 Ves. Jr. 119, 5 Rev. Rep. 237, 31 Eng. Reprint 970.

[48] Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Maquoketa v. Willey, 35 Iowa 323; Caldwell v. Scott, 54 N. H. 414; Rankin v. Jones, 55 N. Car. 169; In re Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752.

[49] Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832; Sedam v. Williams, 4 McLean (U. S.) 51, Fed. Cas. No. 12609; McClean v. Miller, 2 Cranch C. C. 620, Fed. Cas. No. 8692; Bowman v. Spalding, 8 Ky. L. 691, 2 S. W. 911; Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378; Morss v. Gleason, 64 N. Y. 204; In re Dawson, 59 Hun 239, 12 N. Y. S. 781, 36 N. Y. St. 311; Bulger v. Rosa, 53 Hun 239, 6 N. Y. S. 38 (affd. in 119 N. Y. 459, 24 N. E. 853); Wildes v. Chapman, 4 Edw. Ch. (N. Y.) 669; Fries v. Ennis, 132 Pa. St. 195, 19 Atl. 59; Mensing v. Atchison (Tex. Civ. App.), 26 S. W. 509 (1894); Ex parte Morley, 43 L. J. Bankr. 28, 29 L. T. Rep. (N. S.) 442; Ex parte Manchester Bank, 48 L. J. Bankr. 94; Ex parte Wheeler, Buck. 25.

[50] Hudgins v. Rix, 60 Ark. 18, 28 S. W. 422, 30 S. W. 767; Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Hagan v. Scott, 10 La. 345; Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; Cleve-

even been held that a transfer from an insolvent firm to an insolvent partner, in good faith, but upon no consideration beyond his promise to pay firm debts, has a similar result.[51] The more general rule is that such a transfer is voidable as to firm creditors, since nothing of value passes to the firm, and the effect is to hinder firm creditors.[52] Such transfer does not affect the rights of the purchasing partner's individual creditors and can not be attacked by them.[53] Neither does it change the liability of the members of the old firm to its creditors.[54] In case of a solvent firm, there is no doubt of the right of the partners to convert the firm property into separate property by dividing it between them.[55] So, even if the firm is insolvent such division

land Nat. Bank v. Bryant (Tenn.), 54 S. W. 73 (1899); Sanchez v. Gold-Frank (Tex. Civ. App.), 27 S. W. 204 (1894); Douglas v. Alder, 13 Utah 303, 44 Pac. 706.

[51] Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 S. Ct. 899, 30 L. ed. 971; Schleicher v. Walker, 28 Fla. 680, 10 So. 33; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Kincaid v. National Wall-Paper Co., 63 Kans. 288, 65 Pac. 247, 54 L. R. A. 412, 88 Am. St. 243; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564 (distinguished in McDonald v. Cash, 45 Mo. App. 66); Wilcox v. Kellogg, 11 Ohio 394.

[52] Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. 140; Bartlett v. Meyer-Schmidt Grocery Co., 65 Ark. 290, 45 S. W. 1063; In re Landfield, 80 Ill. App. 417; Kelley v. Flory, 84 Iowa 671, 51 N. W. 181; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Saloy v. Albrecht, 17 La. Ann. 75; Franklin Sugar Refining Co. v. Henderson, 86 Md. 452, 38 Atl. 991, 63 Am. St. 524; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. 596; Morehead v. Adams, 18 Nebr. 569, 26 N. W. 242; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Brayton v. Sherman, 45 App. Div. 58, 60 N. Y. S. 1118 (affd. in 166 N. Y. 610, 59 N. E. 1119); Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. 1; Cribb v. Morse, 77 Wis. 322, 46 N. W. 126; Ex parte Mayou, 4 DeG., J. & S. 664, 11 Jur. (N. S.) 433, 34 L. J. Bankr. 25, 12 L. T. (N. S.) 254; In re Caton, 26 U. C. C. P. 308.

[53] Evans v. Hawley, 35 Iowa 83; Christen v. Ruhlman, 22 La. Ann. 570; Pierce v. Tiernan, 10 Gill & J. (Md.) 253; Bush Co. v. Gibbons, 87 App. Div. 576, 84 N. Y. S. 478; Griffin v. Cranston, 1 Bosw. (N. Y.) 281; Boynton v. Page, 13 Wend. (N. Y.) 425; Texas Drug Co. v. Baker, 20 Tex. Civ. App. 684, 50 S. W. 157.

[54] Nixdorff v. Smith, 16 Pet. (U. S.) 132, 10 L. ed. 913; Ward v. Woodburn, 27 Barb. (N. Y.) 346; Jones v. Smith, 31 S. Car. 527, 10 S. E. 340; Yeager v. Focke, 6 Tex. Civ. App. 542, 25 S. W. 662; Conaway v. Stealey, 44 W. Va. 163, 28 S. E. 793.

[55] Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Whit-

has often been upheld on the theory that the creditors' right to a preference is derived only through the partners and is waived by the partners upon the division.[56] In several other decisions the opposite view was taken and the transfer held void as to creditors, and they were held entitled to enforce their claims against the property as firm assets.[57]

§ 532. Individual assets of partner.—A partner's separate estate is all his property which has not been placed in the partnership business.[58] Sometimes it is held a partner's interest in lands used for partnership purposes but not owned by the firm, even though purchased with firm funds, may be reached by his creditors as separate property.[59] An item credited to a partner and the firm account is not his separate property until final settlement.[60] And a partner's interest in an illegal partnership is not separate property.[61] Partners may dispose of their individual property as they see fit, if there are sufficient partnership assets to pay firm debts.[62] A partner has no right to have the individual property of a copartner applied to firm debts.[63] It has often been held that since firm creditors are also creditors of part-

worth v. Benbow, 56 Ind. 194; Poole v. Seney, 66 Iowa 502, 24 N. W. 27;

[56] Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899 (revg. 14 Fed. 155); Lee v. Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Bedford v. McDonald, 102 Tenn. 358, 52 S. W. 157.

[57] Wilkinson v. Yale, 6 McLean (U. S.) 16, Fed. Cas. No. 17678; Cox v. Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933; Clements v. Jessup, 36 N. J. Eq. 569; Ransom v. Vandeventer, 41 Barb. (N. Y.) 307; Ruhl v. Phillips, 2 Daly 45 (revd. on other grounds in 48 N. Y. 125, 8 Am. Rep. 522).

[58] Mann v. Higgins, 7 Gill (Md.) 265; Very v. Clarke, 177 Mass. 52, 58 N. E. 151, 83 Am. St. 260; Reed v. Allerton, 3 Rob. (N. Y.) 551; Ex parte Owen, 4 DeG. & Sm. 351.

[59] Cundey v. Hall, 208 Pa. St. 335, 342, 57 Atl. 761, 1134, 101 Am. St. 938; Stover v. Stover, 180 Pa. St. 425, 36 Atl. 921, 57 Am. St. 654; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17.

[60] Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17.

[61] Patty-Joiner Co. v. City Bank, 15 Tex. Civ. App. 475, 41 S. W. 173.

[62] Whitlock Cordage Co. v. Hine (Md.), 93 Atl. 431; Holmes v. Ferguson-McKinney Dry Goods Co., 86 Miss. 782, 39 So. 70.

[63] Mann v. Higgins, 7 Gill (Md.) 265; McDonald v. Meek, 57 Mo. App. 254.

ners as individuals, an individual partner may make a valid assignment of his separate property to pay firm creditors, thus giving them the preference over individual creditors.[64] It is also held that such a transfer is a fraud upon individual creditors since they have a prior right on individual assets.[65]

It is held that an agreement in a note secured by collateral that the securities might be applied to any other obligation held by the payee, entitled him to apply surplus proceeds from the collateral to the obligation of a partnership in which the maker of the note was a member.[66] A quitclaim deed by a partner in an insolvent firm of all the firm property and good will, on condition that a composition with creditors be carried out was held to be made to relieve the grantor's personal estate from liability and to divest him of all interest in the business.[67]

§ 533. Application of assets of partnership by court.—It has been seen that if a judgment has been recovered against a firm in an action at law, the firm property and the individual property of the partners are alike subject to execution.[68] So equity will not take jurisdiction and marshal the assets of both the firm and the individual members unless both are within its jurisdiction and control, and will not ordinarily interfere with legal priorities or the enforcement of judgments at law.[69]

[64] Newman v. Bagley, 16 Pick. (Mass.) 570 (1835); Gadsden v. Carson, 9 Rich. Eq. (S. Car.) 252, 70 Am. Dec. 207 (1857); Chessher v. Clamp, 10 Tex. Civ. App. 350, 30 S. W. 466 (1895).

[65] Holton v. Holton, 40 N. H. 77; Jackson v. Cornell, 1 Sandf. Ch. (N. Y.) 348.

[66] In re Hill, 186 Fed. 569.

[67] Peters v. McLaren, 218 Fed. 410.

[68] See ch. 16, on liability of partners to third parties.

[69] Lewis v. United States, 92 U. S. 618, 23 L. ed. 513 (affg. Fed. Cas. No. 15595, 13 Nat. Bankr. Reg. 33, 2 Wkly. Notes Cas. 31); In re Sandusky, Fed. Cas. No. 12308, 17 Nat. Bankr. Reg. 452; Elgin Nat. Watch Co. v. Meyer, 30 Fed. 659; Leinkauff v. Munter, 76 Ala. 194; Haralson v. Campbell, 63 Ala. 278; Cleghorn v. Insurance Bank, 9 Ga. 319; Gillaspy v. Peck, 46 Iowa 461; Fullam v. Abrahams, 29 Kans. 725; McCulloh v. Dashiell, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; Stevens v. Perry, 113 Mass. 380; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Newman v. Bagley, 16 Pick. (Mass.) 570; Markham v. Calvit, 5 How. (Miss.) 427; Bray v. Seligman, 75 Mo. 31; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189; Howell v. Teel, 29 N.

It has been seen that a partner has the right to have the firm assets applied to firm debts, and that firm creditors derive from this right a preference in firm property over creditors of individual partners. Out of these principles have been developed the equitable rules as to the application of partnership and individual assets as between partnership and individual creditors.

§ 534. Rights of partnership creditors in partnership assets.—When the application of partnership assets is entirely in the hands of a court of equity, as upon dissolution by the court or bankruptcy or insolvency proceedings, and where the assets are unaffected by any prior disposition on the part of partners or any valid or prior legal liens against them, it has been stated that "the general rule is that the assets of a firm are to be applied in the following manner: (1) In payment of the debts of the firm to persons who are not partners; (2) in payment to each partner ratably what is due from the firm to him for advances, as distinguished from capital put in; (3) in paying each partner ratably what is due from the firm to him in respect of capital; (4) the ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract."[70] This is substantially the rule provided by the Uniform Partnership Act which in this respect merely follows the general law,[71] and the rule obtaining as a general thing is that a preference is to be accorded partnership creditors in the payment of their claims out of the proceeds of the firm property, and that the rights of the creditors of the in-

J. Eq. 490; Wisham v. Lippincott, 9 N. J. Eq. 353; Crook v. Rindskopf, 105 N. Y. 476, 12 N. E. 174; Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465; Hassell v. Griffin, 2 Jones Eq. (N. Car.) 117; In re Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; In re Cumming's Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Kuhne v. Law, 14 Rich. L. (S. Car.) 18; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Straus v. Kerngood, 21 Grat. (Va.) 584; Lord v. Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58.

[70] Hyre v. Lambert, 37 W. Va. 26, 16 S. E. 446.

[71] Uniform Partnership Act, § 40 (b).

dividual members of the firm are measured by the amount of the distributive share of the debtor partner on final settlement.[72]

§ 535. Rights of partnership creditors in assets of individual partners.—Thus the general rule is that firm creditors have a priority in firm assets and creditors of individual partners a priority in their individual assets.[73] With this rule and the reasons advanced for it there has been much dissatisfaction. Mr.

[72] McMillan v. Hadley, 78 Ind. 590. See also Hundley v. Farris, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. 863. Compare and see generally Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Robinson v. Security Co., 87 Conn. 268, 87 Atl. 879, Ann. Cas. 1915 C, 1170; Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459; Troll v. City of St. Louis, 257 Mo. 626, 168 S. W. 167; Ivie v. Blum, 159 N. Car. 121, 74 S. E. 807; Ball v. Danton, 64 Ore. 184, 129 Pac. 1032. See also Bridge v. McCullough, 27 Ala. 661; Lucas v. Atwood, 2 Stew. (Ala.) 378; Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Chase v. Steel, 9 Cal. 64; Filley v. Phelps, 18 Conn. 294; Clark v. Allee, 3 Har. (Del.) 80; Camp v. Mayer, 47 Ga. 414; Conant v. Frary, 49 Ind. 530; Cox v. Russell, 44 Iowa 556; Pease v. Rush, 2 Minn. 107; Bass v. Estill, 50 Miss. 300; Williams v. Gage, 49 Miss. 777; Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378; French v. Lovejoy, 12 N. H. 458; Roberts v. Oldham, 63 N. Car. 297; In re Frow, Jacobs & Co.'s Estate, 73 Pa. St. 459; Johnson v. King, 6 Humph. (Tenn.) 233; Converse v. McKee, 14 Tex. 20; Washburn v. Bellows Falls Bank, 19 Vt. 278; Christian v. Ellis, 1 Grat. (Va.) 396; Carper v. Hawkins, 8 W. Va. 291.

[73] Clark v. Johnson, 7 Ala. App. 507, 61 So. 34; Lewis v. United States, 92 U. S. 618, 23 L. ed. 513; In re Groetzinger, 110 Fed. 366 (affd. 127 Fed. 814, 62 C. C. A. 494); In re Estes, 3 Fed. 134, 6 Sawy. 459; Smith v. Mallory, 24 Ala. 628; Charles v. Eshleman, 5 Colo. 107; Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861; Dean v. Phillips, 17 Ind. 406; Firsch-Wickwire Co. v. Denison Clothing Co. (Iowa), 138 N. W. 1101; Taylor v. Riggs, 8 Kans. App. 323, 57 Pac. 44; Glenn v. Gill, 2 Md. 1; Rosenberg v. Schraer, 200 Mass. 218; Somerset Potters Works v. Minot, 10 Cush. (Mass.) 592; Irby v. Graham, 46 Miss. 425; Davis v. Howell, 33 N. J. Eq. 72 (affd. 34 N. J. Eq. 292); Cammack v. Johnson, 2 N. J. Eq. 163; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; Everall v. Stevens, 158 App. Div. 723, 143 N. Y. S. 874; Rodgers v. Meranda, 7 Ohio St. 179; In re Black's Appeal, 44 Pa. St. 503; Fowlkes v. Bowers, 11 Lea (Tenn.) 144; Read v. Bailey, 3 App. Cas. 94, 47 L. J. Ch. 161, 37 L. T. (N. S.) 510; Rolfe v. Flower, L. R. 1 P. C. 27, 12 Jur. (N. S.) 345; Ex parte Crowder, 2 Vern. 706. See also In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914 A, 798n (revg. 150 App. Div. 922, 135 N. Y. S. 1131).

Mechem says, quoting from a leading case:[74] "The correctness of this rule, however, has been much controverted and there has not always been a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given,—that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner, and that there is consequently a clear equity in confining the creditors, as to preferences to each estate respectively which has been thus benefited by their transactions. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners as well as that of the firm; and also, those who contract with a partner in his separate capacity place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it can not be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm." The court, however, con-

[74] Mechem Partnership, § 293, quoting Rodgers v. Meranda, 7 Ohio St. 179.

cluded that the rule was well established, saying: "Some general rule is necessary, and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantage in having different funds to resort to, while the individual creditors have but one." But whether the reasons assigned for the rule are satisfactory or not, the rule itself seems to be established by the clear weight of authority. And this rule was followed by the framers of the Uniform Partnership Act, since it is the settled rule already in most states.[75] In New York the general rule has been modified to the extent that the holder of a claim arising out of a tort for which the members of the partnership are both jointly and severally liable is entitled upon assignment for creditors to share equally in partnership assets with other partnership creditors, and in individual assets with individual creditors.[76] In some jurisdictions the rule is that firm creditors, must exhaust the firm property and then may share equally with individual creditors in individual property.[77] As to this rule, Mr. Mechem says:[78] "But notwith-

[75] Uniform Partnership Act, § 40 (h). See 29 Harv. L. Rev. 306, article by William Draper Lewis.

[76] In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914 A, 798n (revg. 150 App. Div. 922, 135 N. Y. S. 1131); In re Blackford, 35 App. Div. 330, 54 N. Y. S. 972. And it is held in New York that the personal assets of a partner can not be taken to satisfy firm debts unless firm assets are first exhausted or the estate of the other partner is insolvent. In re Roberts, 214 N. Y. 369, 108 N. E. 562.

[77] Robinson v. Security Co., 87 Conn. 268, 87 Atl. 879, Ann. Cas. 1915 C, 1170; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Gueringer v. His Creditors, 33 La. Ann. 1279; Blair v. Black, 31 S. Car. 346, 9 S. E. 1033, 17 Am. St. 30; Kuhne v. Law, 14 Rich. L. (S. Car.) 18; Sniffer v. Sass, 14 Rich. L. (S. Car.) 20; Gadsden v. Carson, 9 Rich. Eq. (S. Car.) 252, 70 Am. Dec. 207; Fleming v. Billings, 9 Rich. Eq. (S. Car.) 149; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Pettyjohn v. Woodroof, 86 Va. 478, 10 S. E. 715.

[78] Mechem Partnership, § 294.

standing the quite general concurrence in the rule giving each class of creditors priority in the respective funds, it has met with some forcible dissent, and upon principle it is difficult to be sustained. The true rule, from the standpoint of principle, would seem to be that inasmuch as each partner is individually liable for the partnership debts, the creditors of the firm (and therefore of each partner as well), after exhausting the partnership assets, are entitled to share equally with the separate creditors in the separate assets of the partners. The basis of this rule is found in the fact that the partnership creditor has recourse to two funds (i. e. the partnership assets and the individual assets) while the individual creditor has recourse to but one fund, namely the individual assets; and it is a principle of equity that where one creditor has access to two funds while another creditor has access to but one, the former shall exhaust the separate fund before resorting to the common fund." It was also said in a Connecticut case in criticizing the more general rule:[79] "The principle of marshaling of assets has been occasionally invoked. As pertinent as that doctrine may be to the requirement that the joint creditors, having two funds to which they are entitled to look, and the separate creditors only one, the former should be compelled to exhaust the fund against which they alone can go before resorting to the other, it furnishes no justification for forbidding the partnership creditors with claims unsatisfied out of the joint funds to look to the separate funds until after the separate creditors have had their claims satisfied. Equity never wrought into the doctrine of marshaling of assets any principle fraught with any such unjust consequences. * * * A creditor of a partnership can look to partnership property to satisfy his claim, or he can, at his option enforce his judgment by direct levy upon the estate of any partner with an entire disregard of the partnership property. In equity his claim is a joint and several one. A creditor of a partner has no claim upon partner-

[79] Robinson v. Security Co., 87 Conn. 268, 87 Atl. 879, Ann. Cas. 1915 C, 1170.

ship property. The most that he can under any circumstances reach is the interest of the partner, which may be nothing at all if the firm liabilities so make it. A rule of distribution of assets in insolvency which overlooks these distinctions whether heedlessly or in the search for equality as between the two classes of creditors, disregards an important factor in the situation." In some other jurisdictions the rule is that individual creditors shall receive a percentage from the individual property equal to that received from the firm property by firm creditors and the remaining property is then distributed pro rata between the classes.[80] In one case in Maine it was held that the estate of an insane partner and the partnership funds in the hands of the receiver were one fund for the payment of firm debts.[81] In any of these jurisdictions it is usually held that if there is but one fund for both classes of creditors, that is if there are no partnership assets and no solvent partner, then partnership creditors and individual creditors share equally in the separate property of a partner,[82] though the contrary has also been held.[83] Where a partner is a surety for a firm debt, his individual creditors have the right to compel the application of the firm property to the firm debts before his individual property.[84] The creditors of a

[80] Johnson v. Gordon, 102 Ga. 350, 30 S. E. 507; Fayette Nat. Bank v. Kenney, 79 Ky. 133, 2 Ky. L. 35; Whitehead v. Chadwell, 2 Duv. (Ky.) 432; Northern Bank v. Keizer, 2 Duv. (Ky.) 169. Compare Toombs v. Hill, 28 Ga. 371.

[81] Fogg v. Tyler, 111 Maine 546, 90 Atl. 481.

[82] Records v. McKim, 115 Md. 299, 80 Atl. 968; In re West, 39 Fed. 203 (1889); In re Lloyd, 22 Fed. 88 (1884); Emanuel v. Bird, 19 Ala. 596, 54 Am. Dec. 200; Harris v. Peabody, 73 Maine 262; Brock v. Bateman, 25 Ohio St. 609; Rodgers v. Meranda, 7 Ohio St. 179; Grosvenor v. Austin, 6 Ohio 103, 25 Am. Dec. 743; Alexander v. Gorman, 15 R. I. 421, 7 Atl. 243; Pearce v. Cooke, 13 R. I. 184; Higgins v. Rector, 47 Tex. 361; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647 (1883).

[83] Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68 (1852); Warren v. Farmer, 100 Ind. 593 (1884); In re Gray, 111 N. Y. 404 (1888).

[84] In re Foot, 8 Ben. 228, 12 Nat. Bankr. Reg. 337, Fed. Cas. No. 4906; Bell v. Hepworth, 134 N. Y. 442, 31 N. E. 918 (affg. 51 Hun 616, 4 N. Y. S. 823, 22 N. Y. St. 114); Averill v. Loucks, 6 Barb. (N. Y.) 470; Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781. See also Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415.

firm have a prior right over individual creditors of the partners to subject firm real estate to the payment of debts.[85]

§ 536. Rights of creditors of individual partners.—Whatever may be the facts concerning the possession of a lien by partnership creditors, no court has been found which has gone to the extent of holding that creditors of the individual members of the firm are entitled to a preference over the partnership creditors in the matter of satisfaction of their claims from the common property. On the other hand, it seems to be settled that firm creditors take priority over personal creditors, and that the latter are recognized only after the amounts owing the former have been paid, for the rights of individual creditors in firm assets are limited to the debtor's interest which is his share in

Compare Gotzian v. Shakman, 89 Wis. 52, 61 N. W. 304, 46 Am. St. 820; Whitlock Cordage Co. v. Hine (Md.), 93 Atl. 431; Rush v. First Nat. Bank (Tex. Civ. App.), 160 S. W. 319.

[85] Long v. Slade, 121 Ala. 267, 26 So. 31; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. ed. 622 (affg. 3 McLean 27, Fed. Cas. No. 11116); In re Warren, 2 Ware (Dav. 320) 322, Fed. Cas. No. 17191 (1847); Golden State &c. Iron Works v. Davidson, 73 Cal. 389, 15 Pac. 20; Reeves v. Ayers, 38 Ill. 418; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; McMillan v. Hadley, 78 Ind. 590 (1881); Conant v. Frary, 49 Ind. 530 (1875); Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Stadler v. Allen, 44 Iowa 198 (1876); Evans v. Hawley, 35 Iowa 83 (1872); Flanagan v. Shuck, 82 Ky. 617, 6 Ky. L. 699; Bryant v. Hunter, 6 Bush (Ky.) 75; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631 (1855); Calder v. Creditors, 47 La. Ann. 346, 16 So. 852; Crooker v. Crooker, 46 Maine 250; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458 (1852); Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Smith v. Jones, 18 Nebr. 481, 25 N. W. 624 (1885); Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Matlack v. James, 13 N. J. Eq. 126 (1860); Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Everett v. Schepmoes, 6 Hun (N. Y.) 479 (1876); Schenck v. Ingraham, 5 Hun (N. Y.) 397 (1875); Hiscock v. Phelps, 49 N. Y. 97; Sands v. Kimbark, 27 N. Y. 147 (1863); Collumb v. Read, 24 N. Y. 505 (1862); Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Mendenhall v. Benbow, 84 N. Car. 646 (1881); Ross v. Henderson, 77 N. Car. 170 (1877); Donaldson v. State Bank, 16 N. Car. 103, 18 Am. Dec. 577; Marvin v. Trumbull, Wright (Ohio) 386 (1833); Lane v. Jones, 9 Lea (Tenn.) 627; Diggs v. Brown, 78 Va. 292 (1884).

the surplus after firm debts are paid, and after all equities between partners are adjusted.[86] So it has been held that although an individual creditor attaches firm property prior to the suing out of attachment by partnership creditors, the lien of the latter will be superior to that of the former.[87] Again, in another case, the complainants, alleging themselves to be judgment creditors of the partnership, sought to hold the defendants who had obtained possession of the partnership assets by fraudulently representing that one of their number had been appointed receiver, trustees ex maleficio, but the court denied them a decree on account of the fact that their judgments were against persons associated in the partnership relation as individuals, and third

[86] Lovins v. Laub, 85 Misc. 336, 147 N. Y. S. 304; Ryckman v. Manerud, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915 C, 522; Moore Grocery Co. v. McCan (Tex. Civ. App.), 169 S. W. 191. See also State v. Emmons, 99 Ind. 452; United States v. Duncan, 4 McLean (U. S.) 607, Fed. Cas. No. 15003, 12 Ill. 523; New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167; New York Commercial Co. v. Francis, 96 Fed. 266; Dixie Cotton Oil Co. v. Morris, 79 Ark. 113, 94 S. W. 933; Livermore v. Truesdell, 9 Colo. App. 332, 48 Pac. 276; Witter v. Richards, 10 Conn. 37; Haines v. Millers, 61 Ga. 344; McGillis v. Hogan, 190 Ill. 176, 60 N. E. 91 (affg. 85 Ill. App. 194); Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459; Van Zuuk v. Pothoven, 132 Iowa 19, 109 N. W. 288; Holmes v. Miller, 19 Ky. L. 660, 41 S. W. 432; Downing v. Linville, 3 Bush (Ky.) 472; Reily v. Creditors, 45 La. Ann. 470, 12 So. 519; Ridgely v. Carey, 4 Harr. & McH. (Md.) 167; Kunze v. Cox, 113 Mich. 546, 71 N. W. 864, 67 Am. St. 480; Atwood v. Meredith, 37 Miss. 635; Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213, 60 S. W. 87; In re Edward's Estate (Mo.), 24 S. W. 758 (revd. 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681); Rockefellar v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Tappan v. Blaisdell, 5 N. H. 190; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; United Nat. Bank v. Weatherby, 70 App. Div. 279, 75 N. Y. S. 3; Drexel v. Pease, 59 Hun 626, 13 N. Y. S. 774, 37 N. Y. St. 166 (affd. 129 N. Y. 96, 29 N. E. 241); Daniel v. Crowell, 125 N. Car. 519, 34 S. E. 684; Rodgers v. Meranda, 7 Ohio St. 179; McManus v. Smith, 37 Ore. 222, 61 Pac. 844; Pontius v. Walls, 197 Pa. St. 223, 47 Atl. 203; In re Stewart's Estate, 193 Pa. St. 347, 44 Atl. 434; Calhoun v. Bank of Greenwood, 42 S. Car. 357, 20 S. E. 153; Wright v. Market Bank (Ch. App. 1900) (Tenn.), 60 S. W. 623; Willis v. Freeman, 35 Vt. 44, 82 Am. Dec. 619; Maddock's Admx. v. Skinker, 93 Va. 479, 25 S. E. 535; Lewis v. Crane, 50 W. Va. 239, 40 S. E. 347; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742.

[87] New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167.

persons not members of the firm.[88] So a loan of money to a person with which to purchase an interest in a firm,[89] or to a partner to pay the amount of his contribution to the partnership capital does not create a firm obligation.[90] Moreover it has been held that the indorsement by a partner of the individual note of his copartner does not entitle it to satisfaction as a claim against the firm.[91] So where a partner assigns his interest in the property of the firm as security for his individual debt, such security is taken subject to the fluctuations of the business and can only be realized upon after firm debts, including those subsequently contracted, have been paid.[92] But, as was seen, in equity the creditors of individual partners are generally given a preference over firm creditors in a partner's separate estate.[93]

§ 537. Rights of partner as firm creditor.—A partner stands, in the matter of obtaining satisfaction of any debts owing him by the firm as such, on a plane intermediate between those occupied by firm and individual creditors. In other words, he is a secondary creditor. Whatever right he may possess as regards reimbursement is inferior to the rights of partnership creditors and it is only after the latter's claims have been discharged that he can secure recognition of his demands.[94] Yet

[88] Savage v. Johnson, 125 Ala. 673, 28 So. 547.

[89] Dixie Cotton Oil Co. v. Morris, 79 Ark. 113, 94 S. W. 933; Hargadine-McKittrick Dry Goods Co. v. Sappington, 105 Mo. App. 655, 78 S. W. 1049.

[90] McGillis v. Hogan, 190 Ill. 176, 60 N. E. 91 (affg. 85 Ill. App. 194).

[91] In re Hallock, 47 Misc. 571, 96 N. Y. S. 105.

[92] Ivie v. Blum, 159 N. Car. 121, 74 S. E. 807.

[93] See § 535. Emanuel v. Bird, 19 Ala. 596, 54 Am. Dec. 200; Toombs v. Hill, 28 Ga. 371; Bond v. Nave, 62 Ind. 505; Gillaspy v. Peck, 46 Iowa 461; Beard v. Bank of Hardinsburg, 18 Ky. L. 1061, 39 S. W. 501; Arnold v. Hamer, Freem. Ch. (Miss.) 509; McDonald v. Meek, 57 Mo. App. 254; Crockett v. Crain, 33 N. H. 542; Case v. McGill, 69 N. J. Eq. 354, 60 Atl. 569; In re Baldwin, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122; Ganson v. Lathrop, 25 Barb. (N. Y.) 455; Matter of Hallock, 47 Misc. 571, 96 N. Y. S. 105; In re Stewart, 4 Abb. Pr. 408, 4 Bradf. Surr. (N. Y.) 254; In re D'Invillier's Estate, 13 Phila. (Pa.) 362. See Felan v. McGill, 3 Ch. Chamb. (U. C.) 68.

[94] Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129; Coster v. Bank of Georgia, 24 Ala. 37; Josselson v. Butler, 162 Ky. 229, 172 S. W. 503;

it has been held that the assignee of a partner's claim ranks equally with other creditors,[95] and that the claim of a partner will take precedence over the claims of individual creditors of other members of the firm.[96] So, too, it has been held that if a partner mortgage his separate property to secure a firm debt, he thereby becomes a surety for the firm, and that his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the

Wilkerson v. Tichenor, 62 S. W. 870, 23 Ky. L. 244; Simrall v. O'Bannons, 7 B. Mon. (Ky.) 608; Rowlett v. Grieve, 8 Mart. (O. S.) (La.) 483, 13 Am. Dec. 296; White Cloud Milling &c. Co. v. Thomson (Mo.), 175 S. W. 897; Pott v. Schmucker, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. 415; White Cloud Milling &c. Co. v. Thomson, 166 Mo. App. 170, 148 S. W. 969; Ross v. Carson, 32 Mo. App. 148; Roop v. Herron, 15 Nebr. 73, 17 N. W. 353; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Edison Electric Illuminating Co. v. DeMott, 51 N. J. Eq. 16, 25 Atl. 952; Coffin v. Hollister, 64 Hun 639, 5 Silv. 172, 7 N. Y. S. 734; In re Rieser, 19 Hun 202 (affd. 81 N. Y. 629); Martin v. Carlisle (Okla.), 148 Pac. 833; Barr v. McFall, 131 Pa. St. 304, 18 Atl. 876; Colwell v. Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913; Frank v. Anderson, 13 Lea (Tenn.) 695; Schuster v. Farmers' &c. Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; Gibbs v. Humphrey, 91 Wis. 111, 64 N. W. 750; Kay v. Johnston, 21 Beav. 536, 52 Eng. Reprint 967; In re Ruby, 24 Ont. App. 509. But see Gillespie v. Salmon, 2 Cal. App. 501, 84 Pac. 310, in which it is held that where a partner pays and takes up a firm note, he thereby becomes a creditor of the partnership and in his suit for an accounting and settlement, the assets of the firm must be first applied to the payment of his claim.

[95] Frank v. Anderson, 13 Lea (Tenn.) 695. Contra: In re Rieser, 19 Hun 202 (affd. 81 N. Y. 629). See also Nichol v. Stewart, 36 Ark. 612; Moore v. Steele, 67 Tex. 435, 3 S. W. 448.

[96] Boyce v. Coster, 4 Strobh. Eq. (S. Car.) 25. See also Gillespie v. Salmon, 2 Cal. App. 501, 84 Pac. 310; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. 870; Warren v. Taylor, 60 Ala. 218; Nichol v. Stewart, 36 Ark. 612; Rainey v. Nance, 54 Ill. 29; Stone v. Manning, 3 Ill. 530, 35 Am. Dec. 119; Walter v. Herman, 110 Ky. 800, 62 S. W. 857, 23 Ky. L. 741; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; Crooker v. Crooker, 52 Maine 267, 83 Am. Dec. 509; Conkling v. Washington University, 2 Md. Ch. 497; Pierce v. Tiernan, 10 Gill & J. (Md.) 253; Cheeseman v. Sturges, 19 N. Y. Super. Ct. 520; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Mendenhall v. Benbow, 84 N. Car. 646; Moore v. Steele, 67 Tex. 435, 3 S. W. 448; Christian v. Ellis, 1 Grat. (Va.) 396; Ex parte King, 1 Rose 212, 17 Ves. Jr. 115, 11 Rev. Rep. 34, 34 Eng. Reprint 45.

debt so secured.[97] Along the same line it is held that each partner has a specific lien on the partnership stock for moneys advanced by him more than his share for the use of the copartnership, and the lien of each partner exists, not only as against the other partner, but also as against all persons claiming through them or any of them.[98]

§ 538. Rights of partners or firm as creditors of individual partner.—Under the rule that the individual creditors of a partner are preferred to the creditors of the firm in his separate assets, the firm or copartners representing it, can not share in the separate estate until the separate creditors are paid.[99] But where a partner has fraudulently appropriated firm money to his own use, the firm, as a creditor, or its representative is entitled to share equally with his individual creditors.[1] And a copartner who has an individual claim may share with other individual creditors,[2] although in so doing he must not come into competition with firm creditors.[3]

[97] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[98] Lewis v. Harrison, 81 Ind. 278.

[99] In re Hamilton, 1 Fed. 800 (1880); George v. Morison, 93 Md. 132, 48 Atl. 744; Somerset Potters Works v. Minot, 10 Cush. (Mass.) 592; Kirby v. Carpenter, 7 Barb. (N. Y.) 373; In re McCormick's Appeal, 55 Pa. St. 252; Cowan v. Gill, 11 Lea (Tenn.) 674 (1883); Gibbs v. Humphrey, 91 Wis. 111, 64 N. W. 750; Walton v. Butler, 29 Beav. 428, 54 Eng. Reprint 693; Pinkett v. Wright, 2 Hare 120, 6 Jur. 1102, 12 L. J. Ch. 119, 24 Eng. Ch. 120, 67 Eng. Reprint 50; Read v. Bailey (1877), 3 App. Cas. 94; Ex parte assignees of Lodge & Fendal (1790), 1 Vesey Jr. 166. Contra: Bird v. Bird, 77 Maine 499, 1 Atl. 455.

[1] Wile v. Denison Clothing Co., 158 Iowa 109, 138 N. W. 1098; McElroy v. Allfree, 131 Iowa 518, 108 N. W. 119; Ex parte Sillitoe, 1 Glyn & Jameson 374.

[2] Busby v. Chenault, 13 B. Mon. (Ky.) 554; In re Dell, 5 Sawy. (U. S.) 344, Fed. Cas. No. 3774; Hill v. Beach, 12 N. J. Eq. 31; Payne v. Matthews, 6 Paige (N. Y.) 19, 29 Am. Dec. 738; In re Scott's Appeal, 88 Pa. St. 173; Moffatt v. Thomson, 5 Rich. Eq. (S. Car.) 155, 57 Am. Dec. 737; Morris v. Morris, 4 Grat. (Va.) 293; In re Motion, L. R. 9 Ch. 192, 43 L. J. Bankr. 59; Ex parte Watson, Buck 449, 4 Madd. 477, 20 Rev. Rep. 319; Ex parte Topping, 4 DeG., J. & S. 551, 11 Jur. (N. S.) 210; Wood v. Dodgson, 2 M. & S. 195, 1 Rose 47, 14 Rev. Rep. 628.

[3] Mann v. Higgins, 7 Gill (Md.) 265; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; In re Bennett's Estate, 13 Phila. (Pa.) 331; Ex parte

§ 539. Rights of creditors of different firms having common partner.—The rule where there are different partnerships having common members, is that the assets of each partnership belong to its own creditors, in preference to the creditors of the other partnership which has common members.[4] If the same persons carry on the same business at different places and under different names, the courts make no distinction, and recognize but one partnership.[5]

§ 540. Priority of creditors on change of membership.—The general rule is that when a change of members is made as by retirement of one partner and admission of another, this is the creation of a new firm and the property of the old firm becomes that of the new firm, extinguishing the rights of the creditors of the old firm to a preference.[6] This is not the case if it is provided by agreement that change of membership shall not work a dissolution.[7] Where the new firm has agreed in consideration of the transfer of firm assets, to assume the debts of the old firm, then the creditors of each share equally.[8] Change of membership in a joint stock company does not affect the rights of creditors.[9] The framers of the Uniform Partnership Act, recognizing the injustice of the somewhat arbitrary rule that

Andrews, 25 Ch. D. 505, 53 L. J. Ch. 411, 50 L. T. (N. S.) 679; Ex parte Grazebrook, 2 Deac. & C. 186.

[4] Selz v. Mayer, 151 Ind. 422, 51 N. E. 485; Rowlett v. Grieve, 8 Mart. (O. S.) (La.) 483, 13 Am. Dec. 296; Bonwit v. Heyman, 43 Nebr. 537, 61 N. W. 716; In re Grove's Appeal, 176 Pa. St. 354, 35 Atl. 237; McCauly v. McFarlane, 2 Desaus. Eq. (S. Car.) 239.

[5] Campbell v. Colorado Coal &c. Co., 9 Colo. 60, 10 Pac. 248; Bancode Portugal v. Waddell, 5 App. Cas. 161. Compare Oswego Second Nat. Bank v. Burt, 93 N. Y. 233; and West v. Valley Bank, 6 Ohio St. 168.

[6] Locke v. Hall, 9 Greenl. (Maine) 133; Guild v. Leonard, 18 Pick. (Mass.) 511; Smith v. Howard, 20 How. Pr. (N. Y.) 121; Hollis v. Staley, 3 Baxt. (Tenn.) 167, 27 Am. Rep. 759.

[7] Rand v. Wright, 141 Ind. 226, 39 N. E. 447.

[8] Peyser v. Myers, 135 N. Y. 599, 32 N. E. 699; Smead v. Lacey, 1 Disn. 239, 12 Ohio Dec. 597; Shedd v. Brattleboro Bank, 32 Vt. 709; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. 887.

[9] Carter v. McClure, 98 Tenn. 109, 38 S. W. 585, 36 L. R. A. 282, 60 Am. St. 842.

creditors of a firm lost their right to a preference in partnership assets upon a change of membership, provided that in practically all cases of continuance of business by a firm on change of membership, the creditors of the old firm are also creditors of the new firm,[10] and also the incoming partner is made liable for debts of the old firm to the extent of the partnership property.[11]

§ 541. Priority of creditors in cases of ostensible partnership.—In the few cases in which the question has arisen it is generally held that creditors of an ostensible partnership, where in fact one person was sole owner, are not entitled to have the property in the possession of the supposed firm applied to their debts prior to those of the individual creditors of the real debtor.[12] The reasoning seems to be that partnership creditor's rights to a preference can only be worked out through the partner's rights, and if there is no partnership in fact, then there is no basis for such preference.[13] But sometimes a preference may be granted on the ground of estoppel.[14] And in one leading case, the court gave the creditors of the ostensible partnership priority over creditors who had credited the real owner as an individual, the court saying: "If a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such persons, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in

[10] Uniform Partnership Act, § 41.

[11] Uniform Partnership Act, § 17.

[12] Johnson v. Williams, 111 Va. 95, 68 S. E. 410, 31 L. R. A. (N. S.) 406, Ann. Cas. 1912 A, 47; Miller v. Creditors, 37 La. Ann. 604; Bremen Savings Bank v. Branch-Crookes Saw Co., 104 Mo. 425, 16 S. W. 209; Bates v. Nuckols (Miss.), 11 So. 109; Bixler v. Kresge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. 920; In re Sculf's Appeal, 115 Pa. St. 141, 7 Atl. 588.

[13] Grabenheimer v. Rindskoff, 64 Tex. 49; Himmelreich v. Shaffer, 182 Pa. St. 201, 37 Atl. 1007, 61 Am. St. 698; Whitworth v. Patterson, 6 Lea (Tenn.) 119. See also Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146.

[14] Kelly v. Scott, 49 N. Y. 595; Hillman v. Moore, 3 Tenn. Ch. 454;

competition with the creditors who have trusted the two as partners and the business as that of the two. * * * Applying the law thus stated to the question under consideration, the conclusion is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact."[15] And this rule has been applied in other cases.[16] In order to prevent such holdings as this, it was provided in effect in the Uniform Partnership Act that where one represents himself or consents to another representing him as a partner with one or more persons not actually partners, then no partnership liability results, and "he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately."[17]

Meridian Nat. Bank v. McConica, 4 Ohio C. D. 106, 8 Ohio C. C. 442.

[15] Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. 887.

[16] Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Gorham v. Innis, 115 N. Y. 87, 21 N. E. 722; In re Rowland, L. R. 1 Ch. 421; Ex parte Hayman, L. R. 8 Ch. Div. 11; Ex parte Arbouin, 1 De Gex. 359.

[17] Uniform Partnership Act, § 16. See discussion by William Draper Lewis, 29 Harv. Law. Rev., pp. 300-302.

CHAPTER XVIII

CHANGE OF MEMBERSHIP

SECTION

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SECTION

559. Liability of continuing partners or new firm for obligations of old firm.
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§ 550. Change of membership—In general.—As was stated in a former chapter, a partner has a right to sell his interest in the firm.[1] The sale by a partner of his interest in the firm does not prevent the other partners from carrying on the business, and if they do it is presumed that it is done under the old agreement.[2] There are many holdings to the effect that a transfer of a partner's interest works a dissolution of the firm.[3]

[1] See ante ch. 11, § 291. See also Alvord v. Smith, 5 Pick. (Mass.) 232; Cochran v. Perry, 8 Watts & S. (Pa.) 262; Cassels v. Stewart, 6 App. Cas. 64, 29 Wkly. Rep. 636; Ex parte Peake, 1 Madd. 346, 16 Rev. Rep. 233, 56 Eng. Reprint 128.

[2] See ante § 225, on continuation of business. See also Frederick v. Cooper, 3 Iowa 171; Gossett v. Weatherly, 58 N. Car. 46; Zaepfel v. Baumgardner, 6 Lanc. Bar. (Pa.) 141. Contra: Givens v. Berry, 21 Ky. L. 680, 52 S. W. 942, holding that a new partnership is created when a new partner is admitted.

[3] See § 591, on dissolution by transfer of partner's interest.

So it has often been held that the retirement of a partner,[4] the admission of a new partner,[5] the sale of a partner's interest to a copartner,[6] or to a third person,[7] bring about the dissolution of the firm. And there are authorities to the effect that when a partner retires from the firm or a new partner is admitted, without discontinuing the business, this is the dissolution of the old firm and the creation of a new one.[8] Under the Uniform Partnership Act transfer of a partner's interest does not of itself dissolve a partnership.[9] Whatever in the absence of express agreement of all partners may be the technical effect of the admission of a new member or retirement of an old member these conditions are ordinarily cared for by agreement, either under provisions in partnership articles authorizing a retirement,[10] or arrangements made by the partners at the time of retirement.[11] By agreement of all the partners a new member may be admitted into an existing firm, increasing the number of partners,[12] but

[4] Violett v. Fairchild, 6 La. Ann. 193; Beaver v. Lewis, 14 Ark. 138; Spaunhorst v. Link, 46 Mo. 197; Warren v. Maloney, 29 Mo. App. 101; Bank of Mobile v. Andrews, 2 Sneed. (Tenn.) 535.

[5] Hatchett v. Blanton, 72 Ala. 423; McCall v. Moss, 112 Ill. 493; Mudd v. Bast, 34 Mo. 465; Bank of Mobile v. Andrews, 2 Sneed. (Tenn.) 535; Peters v. McWilliams, 78 Va. 567.

[6] Schleicher v. Walker, 28 Fla. 680, 10 So. 33; Clark v. Carr, 45 Ill. App. 469; Rogers v. Nichols, 20 Tex. 719. Not ipso facto, Taft v. Buffum, 14 Pick. (Mass.) 322; Lobdell v. Baldwin, 93 Mich. 569, 53 N. W. 730.

[7] McCall v. Moss, 112 Ill. 493; De Manderfield v. Field, 7 N. Mex. 17, 32 Pac. 146; Mumford v. McKay, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; Cochran v. Perry, 8 Watts & S. (Pa.) 262; Ballard v. Callison, 4 W. Va. 326; Conrad v. Buck, 21 W. Va. 396.

[8] See § 591, on dissolution by transfer of interest.

[9] Uniform Partnership Act, § 27.

[10] Alvord v. Smith, 5 Pick. (Mass.) 232; Guccione v. Scott, 33 App. Div. 214, 53 N. Y. S. 462 (affg. 21 Misc. 410, 47 N. Y. S. 475); Merrick v. Brainard, 38 Barb. (N. Y.) 574; Cooper v. Edeburn, 198 Pa. St. 229, 47 Atl. 1116; Wilson v. Black, 164 Pa. St. 555, 30 Atl. 488; Houghtaling v. Brinckle, 7 Pa. Dist. 518; McGlensey v. Cox, 1 Phila. (Pa.) 387; Collins v. Barker (1893), 1 Ch. 578, 62 L. J. Ch. 316, 68 L. T. 572; Rowlands v. Evans, 30 Beav. 302, 8 Jur. (N. S.) 88; Cooper v. Watlington, 2 Chit. 451, 18 E. C. L. 732; Watney v. Trist, 45 L. J. Ch. 412. And see Schuyler v. Cullen, 120 App. Div. 637, 105 N. Y. S. 544.

[11] Hazell v. Clark, 89 Mo. App. 78; McConomy v. Reed, 152 Pa. St. 42, 25 Atl. 176; Gray v. Smith, 43 Ch. D. 208, 59 L. J. Ch. 145.

[12] See ante § 201, delectus personarum.

one partner has no power to admit another into the firm.[13] The admission of a new partner into a firm may be a valid consideration for an agreement of another partner to abstain from various acts.[14]

§ 551. **Transfer of partner's interest to copartner.**—The transfer by a partner of his interest in the firm business to a copartner upon valuable consideration, passes his entire title to firm property and assets,[15] subject to no liens in favor of partnership creditors.[16] A note given for such interest is a valid debt.[17] If either partner does not act with the utmost good faith toward the other in the sale and purchase of an interest in the business, the sale may be rescinded or an action for deceit will lie.[18] But the agreement for transfer must be clear and completely executed, and a partner's interest in firm property is not affected by mere preliminary negotiations for a sale of his interest or the creation of an agency in the other partner to collect firm debts.[19] Thus, partners who buy a note which another partner owes to the firm for his interest in the partnership do not acquire the right to take his place in the firm.[20] But a transfer of his interest by a partner to a copartner is subject to a prior mortgage

[13] Folsom v. Fernstrom, 43 Utah 432, 134 Pac. 1021.

[14] Marvel v. Jonah, 86 Atl. 968, 81 N. J. Eq. 369.

[15] Richardson v. Davis, 70 Miss. 219, 11 So. 790; Towle v. Hammond, 99 Fed. 510, 40 C. C. A. 498; Matherson v. Belden, 14 App. Div. 519, 43 N. Y. S. 888; Euless v. Tomlinson (Tex. Civ. App.), 38 S. W. 534 (1896); Bean v. Warden (Tex. Civ. App.), 31 S. W. 831 (1895); Ex parte Birley, 2 Mont., D. & DeG. 354; Cofton v. Horner, 5 Price 537; Lingen v. Simpson, 1 Sim. & St. 602, 24 Rev. Rep. 249; Hughes v. Chambers, 14 Manitoba 163; Crowe v. Buchanan, 36 Nova Scotia 1.

[16] In re Suprenant, 217 Fed. 470.

[17] Richardson v. Davis, 70 Miss. 219, 11 So. 790; Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806.

[18] See ch. 14, § 400, on duties of partners toward each other. See also Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923; Crawford v. Stainback, 76 Ark. 346, 88 S. W. 991; Wright v. Duke, 91 Hun 409, 36 N. Y. S. 853, 72 N. Y. St. 375; Law v. Law (1905), 1 Ch. 140, 74 L. J. Ch. 169; Stroud v. Wiley, 27 Ont. App. 516.

[19] Spears v. Willis, 151 N. Y. 443, 45 N. E. 849; Riggen v. Investment Co., 31 Ore. 35, 47 Pac. 923.

[20] Yergler v. Kaufmann, 176 Ill. App. 563.

known to the purchasing partner.[21] A purchase by one partner of a copartner's share will not inure to the benefit of a third partner.[22]

§ 552. Transfer of partner's interest to third party.—A partner has full power to transfer his interest in the firm to a third person.[23] But such transfer does not make the transferee a partner in the firm, it only conveys his interest, which is a right to his share of the profits and surplus, and where such transfer is held to work a dissolution, the right acquired by the assignee is merely the partner's share in the surplus after all debts of the firm are paid and partnership accounts settled.[24] A few cases have held that he becomes a tenant in common in partnership property.[25] The Uniform Partnership Act provides as to the transfer of a partner's interest, which is defined as "his share of the profits and surplus and the same is personal property," that:[26] "a conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to inter-

[21] Watts v. Driscoll, 82 L. T. Rep. (N. S.) 255.

[22] Towle v. Hammond, 99 Fed. 510, 40 C. C. A. 498.

[23] See §§ 291, 292. See also Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832; Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Jackson v. Stanford, 19 Ga. 14; Pease v. Rush, 2 Minn. 107; Merrick v. Brainard, 38 Barb. (N. Y.) 574.

[24] Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; New York Fourth Nat. Bank v. Carrollton R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Rosenstiel v. Gray, 112 Ill. 282; Shuler v. Dutton, 75 Iowa 155, 39 N. W. 239; Leader v. Plante, 95 Maine 343, 50 Atl. 53, 85 Am. St. 418; Tarbell v. West, 86 N. Y. 280; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Reinheimer v. Hemingway, 35 Pa. St. 432; Still v. Focke, 66 Tex. 715, 2 S. W. 59; In re Ritson (1899), 1 Ch. 128, 68 L. J. Ch. 77. But see Keith v. Ham, 89 Ala. 590, 7 So. 234; Planters' Trading Co. v. Moore, 7 Ala. App. 393, 62 So. 302; Bloodworth v. Booser, 99 Ark. 238, 138 S. W. 457; Tuller v. Leaverton, 143 Iowa 162; Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216, Ann. Cas. 1912 D, 1205n.

[25] McCauley v. Fulton, 44 Cal. 355; Stokes v. Stevens, 40 Cal. 391; Kingman v. Spurr, 24 Mass. (7 Pick.) 235.

[26] Uniform Partnership Act, §§ 26, 27, 28.

fere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled. In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require. The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution: (a) with separate property, by any one or more of the partners, or (b) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold. Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership." However, there is no conflict in the law, that the purchase of a partner's interest does not make the purchaser a partner, unless all the other partners consent to his admission, for the principle is firmly established that one can not be made a partner of another without his consent,[27] but such

[27] Jones v. Way, 78 Kans. 535, 97 Pac. 437, 18 L. R. A. (N. S.) 1180n; McNamara v. Gaylord, 1 Bond (U. S.) 302, Fed. Cas. No. 8910; Freligh v. Miller, 16 La. Ann. 418; Fearn v. Tiernan, 4 Rob. (La.) 367; Kingman v. Spurr, 24 Mass. (7 Pick.) 235; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242; Freeman v. Bloomfield, 43 Mo. 391; Waterman v. Johnson, 49 Mo. 410; Gorder v. Pankonin, 83 Nebr. 204, 119 N. W. 449, 131 Am.

consent may be shown by acquiescence or ratification.[28] Where a sale to a third person is made on the basis of the books and inventory of the firm, the contract includes no debts not found on the books or in the inventory.[29]

§ 553. Firm name—Good-will—Competition by retiring partner.—The right to use the firm name after sale of one partner's interest, the disposal of the good-will of the firm, and the right of a retiring partner to engage in business of a competing nature with that of the old firm, were all discussed rather fully in the preceding chapters on firm name, powers and good-will, and reference to those chapters should be made. It may be said here generally that the right to the use of the firm name may be regulated by agreement,[30] that in some jurisdictions partners continuing the business have no right to use the old firm name after the retirement of a partner,[31] that in other jurisdictions the purchasers of the partnership property and business are entitled to use the firm name if done in such a manner as to relieve the retiring partner from liability,[32] that the good-will

St. 629; Filley v. Walker, 28 Nebr. 506, 44 N. W. 737; Fay v. Waldron, 3 N. Y. S. 894.

[28] Meaher v. Cox, 37 Ala. 201; Rosenstiel v. Gray, 112 Ill. 282; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Mason v. Connell, 1 Whart. (Pa.) 381; Cochran v. Perry, 8 Watts & S. (Pa.) 262.

[29] McGilvery v. McGilvery, 23 Idaho 116, 128 Pac. 978.

[30] Harryman v. Harryman, 93 Kans. 223, 144 Pac. 262; Bagby &c. Co. v. Rivers, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632, 67 Am. St. 357; Holbrook v. Nesbitt, 163 Mass. 120, 39 N. E. 794; Rosenheim v. Rosenfield, 59 Hun 625, 13 N. Y. S. 720, 37 N. Y. St. 550; Howland v. Roosevelt, 5 N. Y. S. 75; Fite v. Dorman (Tenn.), 57 S. W. 129 (1900).

[31] California Civ. Code, § 992; Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001, applying Pub. Stat., ch. 76, §§ 6, 7; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543; Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935, 17 N. Y. Ann. Cas. 43; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Adams v. Adams, 7 Abb. N. Cas. (N. Y.) 292; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473.

[32] Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; Brass &c. Works v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; In re Fraser (1892), 2 Q. B. 633, 67 L. T. Rep. (N. S.) 401; Burchell v. Wilde (1900), 1 Ch. 551, 69 L. J. Ch. 314; Levy v. Walker,

of the business is property, salable as such, passing to purchasers of a partner's entire interest,[33] unless a contrary intention is shown,[34] and that a retiring partner may set up a competing business so long as he does not mislead customers into believing that he has succeeded the old firm,[35] or may by agreement lose his right to carry on such a business,[36] while there are some decisions granting him the right to solicit old customers, some denying such right.[37]

§ 554. Rights of retiring partner in assets of old firm.—An absolute executed sale of a partner's interest in the firm deprives him of property rights in the assets,[38] and he becomes the purchaser's creditor,[39] he has lost his lien on the assets of the

10 Ch. D. 436, 48 L. J. Ch. 273; Bryce v. Davidson, 25 U. C. Q. B. 371.

[33] California Civ. Code, § 993; Montana Civ. Code, § 1372; Bell v. Ellis, 33 Cal. 620; Whitney v. Whitney, 115 Ky. 552, 74 S. W. 194, 24 Ky. L. Rep. 2465; Warfield v. Booth, 33 Md. 63; Dwight v. Hamilton, 113 Mass. 175; Cassidy v. Metcalf, 1 Mo. App. 593; Sheppard v. Boggs, 9 Nebr. 257, 2 N. W. 370; People v. Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126; Steinfeld v. National Shirtwaist Co., 99 App. Div. 286, 90 N. Y. S. 964; Kellogg v. Totten, 16 Abb. Pr. (N. Y.) 35; Brass &c. Works v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Burckhardt v. Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 843; Burkhardt v. Burkhardt, 5 Ohio Dec. (Reprint) 185; Fite v. Dorman (Tenn.), 57 S. W. 129 (1900); Hill v. Fearis (1905), 1 Ch. 466, 74 L. J. Ch. 237; Townsend v. Jarman (1900), 2 Ch. 698; Jennings v. Jennings (1898), 1 Ch. 378, 67 L. J. Ch. 190.

[34] Webster v. Webster, 180 Mass. 310, 62 N. E. 383; McCall v. Moschcowitz, 14 Daly 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107.

[35] Crownfield v. Phillips (Md.), 92 Atl. 1033; Cottrell v. Babcock Printing Press Mfg. Co., 54 Conn. 122, 6 Atl. 791; Garrison v. Nute, 87 Ill. 215; Armstrong v. Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; White v. Jones, 1 Abb. Pr. (N. S.) 328, 24 N. Y. Super. Ct. 321; Burkhardt v. Burkhardt, 5 Ohio Dec. 185; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Trego v. Hunt (1896), A. C. 7, 65 L. J. Ch. 1; Churton v. Douglas, Johns. 174, 5 Jur. (N. S.) 887.

[36] Du Bois v. Padgham, 18 Cal. App. 298, 123 Pac. 207.

[37] See ch. 12, §§ 317-319.

[38] Gilmour v. Kerr (Ky.), 36 S. W. 554; Hyde v. Easter, 4 Md. Ch. 80; Mafflyn v. Hathaway, 106 Mass. 414; Ex parte Clarkson, 4 Deac. & C. 56, 2 Mont. & A. 4; Grace v. Smith, W. Bl. 998.

[39] Moses v. Powers, 19 Pa. Super. Ct. 393; Huffman v. Huffman, 63 S.

firm[40] and such assets are subject to the claims of the purchaser's creditors.[41] Where the sale does not become absolute until the purchaser performs some condition, such as paying firm creditors or paying the purchase-price, or where the purchaser took subject to a trust for creditors of the firm, the retiring partner has a lien on the firm assets which may be asserted by him or by creditors of the firm.[42] A retiring partner who has not sold his interest is entitled to share in the firm assets, on distribution,[43] and has a right to share in the profits made after his retirement.[44] If,

Car. 1, 40 S. E. 963; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; R. F. Scott Grocery Co. v. Carter (Tex. Civ. App.), 34 S. W. 375 (1896).

[40] Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Coffin v. McCullough, 30 Ala. 107; Parker v. Merritt, 105 Ill. 293; Goembel v. Arnett, 100 Ill. 34; Barkley v. Tapp, 87 Ind. 25; Griffith v. Buck, 13 Md. 102; Andrews v. Mann, 31 Miss. 322; Commercial Bank v. Lewis, 13 Sm. & M. (Miss.) 226; Alpaugh v. Savage (N. J.), 19 Atl. 380; Vosper v. Kramer, 31 N. J. Eq. 420; Cory v. Long, 2 Sweeny (N. Y.) 491; Latham v. Skinner, 62 N. Car. 292; Seibricht v. Rohrkasse, 3 Ohio Dec. (Reprint) 43, 2 Wkly. L. Cas. 257. See also McGregor v. Ellis, 2 Disn. (Ohio) 286, 13 Ohio Dec. 175; Tracy v. Walker, 1 Flip. (U. S.) 41, Fed. Cas. No. 14129; Croone v. Bivens, 2 Head (Tenn.) 339; Hall v. Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861.

[41] Baca v. Ramos, 10 La. 417, 29 Am. Dec. 463; Vetterlein v. Barnes, 6 Fed. 693; Steffee v. Kerr, 2 Woodw. Dec. (Pa.) 175.

[42] McGown v. Sprague, 23 Ala. 524; Parker v. Merritt, 105 Ill. 293; Hatchell v. Chew, 58 S. W. 816, 22 Ky. L. 738; Olson v. Morrison, 29 Mich. 395; Topliff v. Vail, Harr. (Mich.) 340; Fitzgerald v. Christ, 20 N. J. Eq. 90; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; In re Dawson, 59 Hun 239, 12 N. Y. S. 781, 36 N. Y. St. 311; Williams v. Bush, 1 Hill (N. Y.) 623; Robb v. Stevens, 1 Clarke Ch. (N. Y.) 191; Brenton v. Thompson, 20 Leg. Int. (Pa.) 133; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; White v. Parish, 20 Tex. 688, 73 Am. Dec. 204; Kellogg v. Fox, 45 Vt. 348; Shackelford v. Shackelford, 32 Grat. (Va.) 481; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 51 Am. St. 887, 30 L. R. A. 549; In re Kemptner, L. R. 8 Eq. 286, 21 L. T. 223, 17 W. R. 818; Ex parte Wood, 10 Ch. D. 554, 39 L. T. Rep. (N. S.) 646; Stevenson v. Sexsmith, 21 Grant Ch. (U. C.) 355; McGregor v. Anderson, 6 Grant Ch. (U. C.) 354.

[43] Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Blun v. Mayer, 113 App. Div. 247, 99 N. Y. S. 25; Watson v. Itasca First Nat. Bank, 95 Tex. 351, 67 S. W. 314 (affg. (Civ. App. 1902) 66 S. W. 232). In re Langmead, 20 Beav. 20, 1 Jur. (N. S.) 198; Fisher v. McPhee, 28 Nova Scotia 523; Schuyler v. Cullen, 120 App. Div. 637, 105 N. Y. S. 544.

[44] Varnum v. Winslow, 106 Iowa

through mistake or fraud in accounting, errors were made on the side of the retiring partner, showing too large a balance due him, the purchasing partner may have the accounting surcharged in equity as to the amount of the errors.[45] The purchasing partner may have a settlement set aside for duress and fraud of the retiring partner,[46] but not if he has failed to seek to rescind, and to restore the consideration received.[47]

§ 555. Rights of continuing partners and new firm in assets of old firm.—In most cases the rights of the continuing partners or of a new firm in the assets of the old firm will be found to have been fixed by agreement. If the terms of the agreement are such that the partner merely sells his interest and the transferees continue the old firm, they acquire all rights to firm assets which the old firm had.[48] If, however, the change in membership has caused a dissolution of the firm and afterward a new one is formed, it seems there must be an express,[49] or clearly implied[50] agreement in order to pass the property interests of the old firm completely, and ordinarily the property remains that of the old firm.[51] Thus, where a partner is indebted to the old firm, his indebtedness does not pass to the

287, 76 N. W. 708; Moore v. Rawson, 185 Mass. 264, 70 N. E. 64.

[45] Ehrmann v. Stitzel, 121 Ky. 751, 90 S. W. 275, 28 Ky. L. 728, 123 Am. St. 224.

[46] Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923.

[47] Dovey v. Dovey, 95 Nebr. 624, 146 N. W. 923.

[48] Rudy v. Austin, 56 Ark. 73, 19 S. W. 111, 35 Am. St. 85; Bradley v. Richardson, 2 Blatchf. (U. S.) 343, 3 Fed. Cas. No. 1786, 23 Vt. 720; Robbins v. Butler, 24 Ill. 387; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Burnell v. Weld, 59 Maine 423; Pease v. Rush, 2 Minn. 107; St. Nicholas Bank v. De Rivera, 3 N. Y. S. 666; Gast v. Johnston, 3 N. Y. St. 258; Clark v. McClelland, 2 Grant (Pa.) 31; Ex parte Alexander, 1 Glyn & J. 409, 2 Glyn & J. 275; Ex parte Peake, 1 Madd. 346, 16 Rev. Rep. 233.

[49] Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554; Adams v. Willimantic Linen Co., 46 Conn. 320; Grafton v. Paine, 7 App. Cas. (D. C.) 255; Moshier v. Kitchell, 87 Ill. 18; Tobias v. Commercial Sav. Bank, 136 Mich. 135, 98 N. W. 984; Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554.

[50] New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167.

[51] Painter v. Wilcox, 52 Colo. 639, 125 Pac. 503.

new one, but continues to be the property of the old, unless there is a special agreement of all partners.[52] But it seems to be the rule that where copartners purchase a partner's interest and agree to pay the firm debts, this extinguishes his indebtedness to the firm, the presumption being that this indebtedness was taken into account in reckoning the value of the partner's interest.[53]

§ 556. Liability of retiring partner for obligations of old firm.—A partner who has retired from a firm remains liable as principal after that time on all firm obligations incurred previous to his retirement. This rule holds even where his copartners or the new firm have agreed to discharge all such obligations, for while he would not be liable to contribute to the copartners on such obligations, he is bound to the creditors who contracted with the firm when he, as a member of the firm, was a principal in the making of the contract,[54] except in cases where

[52] McCall v. Moss, 112 Ill. 493; Rosenstiel v. Gray, 112 Ill. 282; Tomlinson v. Hammond, 8 Iowa 40; Learned v. Ayres, 41 Mich. 677, 3 N. W. 178; Akhurst v. Jackson, 1 Swanst. 85, 36 Eng. Reprint 308.

[53] Liquidating Comrs. of Bank of Monroe v. Dodson, 131 La. 990, 60 So. 659; Painter v. Painter, 68 Cal. 395, 9 Pac. 450; Clark v. Carr, 45 Ill. App. 469; Houk v. Walker, 131 Ind. 231; Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Over v. Hetherington, 66 Ind. 365; Hasselman v. Douglass, 52 Ind. 252; Mueller v. Sutter, 96 Iowa 80, 64 N. W. 665; Leeds v. Holmes, 6 Mart. (La.) (N. S.) 655; Sweet v. McConnel, 2 Nebr. 1; Schlicker v. Whyte, 65 N. J. Eq. 404, 54 Atl. 1125; Linke v. Fleming, 25 Grat. (Va.) 704; Hobbs v. Wilson, 1 W. Va. 50. Contra: Jones v. Bliss, 45 Ill. 143; Coffing v. Taylor, 16 Ill. 457.

[54] Julius Andrae & Sons Co. v. Peck, 176 Mo. App. 61, 162 S. W. 1059; Hayward v. Burke, 151 Ill. 121, 37 N. E. 846; Wiley v. Temple, 85 Ill. App. 69; Goodenow v. Jones, 75 Ill. 48; Richards v. Fisher, 2 Allen (Mass.) 527; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Botsford v. Kleinhans, 29 Mich. 332; Skinner v. Hitt, 32 Mo. App. 402; Grotte v. Weil, 62 Nebr. 478, 87 N. W. 173; Morss v. Gleason, 2 Hun 31, 4 Thomp. & C. 274 (affd. 64 N. Y. 204); Sinclair v. Galland, 8 Daly (N. Y.) 508; Morehead v. Wriston, 73 N. Car. 398; Dean v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610 and exhaustive note; Butler v. Birkey, 13 Ohio St. 514; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; Bryan v. Henderson, 88 Tenn. 23, 12 S. W. 338; Mogelin v. Westhoff, 33 Tex. 788; Sanders v. Bush (Tex. Civ. App.),

the creditors have agreed to accept and substitute the liability of the continuing partners or new firm,[55] or have become estopped to hold the retiring partner.[56]

§ 557. Assumption of debts of old firm.—A creditor can not be held to have assented to the agreement of a new firm or continuing partners to assume liability for all debts of the old firm because of mere knowledge or notice of it.[57] The agreement of creditors to an assumption of partnership debts which will release a retiring partner must be based on a good and suffi-

39 S. W. 203; Smith v. Jameson, 5 T. R. 601, Peake 213; Bailey v. Griffith, 40 U. C. Q. B. 418.

[55] Webb v. Butler (Ala.), 68 So. 369; Harris v. Lindsay, 4 Wash. (U. S.) 271, Fed. Cas. No. 6124; Harris v. Lindsay, 4 Wash. (U. S.) 98, Fed. Cas. No. 6123; Regester v. Dodge, 19 Blatchf. (U. S.) 79, 6 Fed. 6, 61 How. Pr. (N. Y.) 107; First Nat. Bank v. Cheney, 114 Ala. 536, 21 So. 1002; Brewer v. Johnson, 87 Ark. 641, 112 S. W. 364; Tootle v. Cook, 4 Colo. App. 111, 35 Pac. 193; Griffin v. Orman, 9 Fla. 22; Doxey v. Service, 30 Ind. App. 174, 65 N. E. 757; Morrison v. Kendall, 6 Ind. App. 212, 33 N. E. 370; McAreavy v. Magirl, 123 Iowa 605, 99 N. W. 193; Eagle Mfg. Co. v. Jennings, 29 Kans. 657, 44 Am. Rep. 668; Norman v. Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419; Keim &c. Hardw. Co. v. Williams, 154 Mo. App. 716, 136 S. W. 1; Willis Coal &c. Co. v. Furstenfeld, 146 Mo. App. 279, 129 S. W. 1028; Ridgley v. Robertson, 67 Mo. App. 45; National Cash Register Co. v. Brown, 19 Mont. 200, 47 Pac. 995, 37 L. R. A. 515, 61 Am. St. 498; Grotte v. Weil, 62 Nebr. 478, 87 N. W. 173; Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. S. 924; Dean v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Butler v. Birkey, 13 Ohio St. 514; Whittier v. Gould, 8 Watts (Pa.) 485; Bryan v. Henderson, 88 Tenn. 23, 12 S. W. 338; Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. 783; Buchanan v. Clark, 10 Grat. (Va.) 164; Wadhams v. Page, 1 Wash. 420, 25 Pac. 462 (revd. on other grounds in 6 Wash. 103, 32 Pac. 1068); McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991; Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708; First Nat. Bank v. Finck, 100 Wis. 446, 76 N. W. 608; Swire v. Redman, L. R. 1 Q. B. Div. 536, 35 L. T. 470, 24 W. R. 1069.

[56] Regester v. Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. (N. Y.) 107.

[57] Morrison v. Kendall, 6 Ind. App. 212, 33 N. E. 370; Hayward v. Burke, 151 Ill. 121, 37 N. E. 846; Clark v. Taylor, 68 Iowa 519, 27 N. W. 493; Weirick v. Graves, 73 Ill. App. 266; Botsford v. Kleinhans, 29 Mich. 332; Ridgley v. Robertson, 67 Mo. App. 45; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Whittier v. Gould, 8 Watts (Pa.) 485; Frye v. Phillip, 46 Wash. 190, 89 Pac. 559; Scott v. Hallock, 16 Wash. 439, 47

cient consideration.[58] The earlier rule was that a mere undertaking by one partner on dissolution to pay a firm debt is not a consideration for the release of a retiring partner, since the promising partner was already bound,[59] but later the rule has been stated that a consideration is sufficient where a creditor obtains greater security and the obligation of an individual partner may be a better security, better terms of payment, negotiable paper or other benefit, or where there is a detriment to the retiring partner.[60]

§ 558. Retiring partner as surety on obligations of old firm.—The retiring partner, on another partner assuming after dissolution the payment of firm debts, becomes a surety for the existing debts. All cases admit that he is a surety as to the copartners,[60a] and that creditors of the old firm have the right

Pac. 968; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991; Waldeck v. Brande, 61 Wis. 579, 21 N. W. 533; Blew v. Wyatt, 5 Car. & P. 397.

[58] Norman v. Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419; Silverman v. Chase, 90 Ill. 37; Bronx Metal Bed Co. v. Wallerstein, 84 N. Y. S. 924; Laucks v. Martin, 6 Sad. (Pa) 352, 9 Atl. 279, 20 W. N. C. 93.

[59] Early v. Burt, 68 Iowa 716, 28 N. W. 35; Fagg v. Hambel, 21 Iowa 140, 89 Am. Dec. 561; Fowler v. Coker, 107 Ga. 817, 33 S. E. 661; Clark v. Billings, 59 Ind. 508; Eagle Mfg. Co. v. Jennings, 29 Kans. 657, 44 Am. Rep. 668; Chase v. Vaughan, 30 Maine 412; Walstrom v. Hopkins, 103 Pa. St. 118; Nightingale v. Chafee, 11 R. I. 609, 23 Am. Rep. 531; Lodge v. Dicas, 3 Barn. & Ald. 611, 22 R. R. 497; David v. Ellice, 5 Barn. & C. 196, 1 Car. & P. 368, 4 L. J. (O. S.) K. B. 125, 29 R. R. 216.

[60] Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223; In re Clap, 2 Lowell (U. S.) 226, Fed. Cas. No. 2784; Hellman v. Schwartz, 44 Ill. App. 84; Leihy v. Briggs, 33 Ill. App. 534; Rusk v. Gray, 83 Ind. 589; Motley v. Wickoff, 113 Mich. 231, 71 N. W. 520; Ludington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601; Backus v. Fobes, 20 N. Y. 204; Lyth v. Ault, 7 Exch. 669; Thompson v. Percival, 5 Barn. & Ad. 925, 3 Nev. & M. 167, 3 L. J. K. B. 98; Kirwan v. Kirwan, 4 Tyr. 491, 2 C. & M. 617, 3 L. J. Ex. 187; Staver Carriage Co. v. Jones, 32 Okla. 713, 123 Pac. 148; Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340.

[60a] Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700; Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124; MacIntyre v. Massey, 11 Ga. App. 458, 75 S. E. 814; Chandler v. Higgins, 109 Ill. 602; Conwell v. McCowan, 81 Ill. 285; Wiley v. Temple, 85 Ill. App. 69; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Williams v. Boyd, 75 Ind. 286; McAreavy v. Magirl, 123 Iowa 605, 99 N. W. 193; Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223;

in collecting their claims to proceed against all the old partners.[61] And the general rule indicated by the more modern authorities is that as to all creditors who have notice of the arrangement by which one partner assumes firm debts, the retiring partner is liable only as surety,[62] but in order to apply this rule, the creditors must have had not only notice of the dissolution, but also notice of the assumption of debts by one partner. As said in

Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Graham v. Thornton (Miss.), 9 So. 292; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Waddington v. Vredenbergh, 2 Johns. Cas. (N. Y.) 227; Williams v. Bush, 1 Hill (N. Y.) 623; Morss v. Gleason, 64 N. Y. 204 (affg. 2 Hun 31, 4 Thomp. & C. 274); Millerd v. Thorn, 56 N. Y. 402, 15 Abb. Pr. (N. S.) 371; Dodd v. Dreyfus, 17 Hun (N. Y.) 600, 57 How. Pr. 319; Reed v. Asche, 18 App. Div. 501, 46 N. Y. S. 126; Dean v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610; Wilson v. Stilwell, 14 Ohio St. 464; Butler v. Birkey, 13 Ohio St. 514; Campbell v. Floyd, 153 Pa. St. 84, 25 Atl. 1033; In re Frow's Estate, 73 Pa. St. 459; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; Bryan v. Henderson, 88 Tenn. 23, 12 S. W. 338; Ætna Ins. Co. v. Wires, 28 Vt. 93; Johnson v. Young, 20 W. Va. 614; Webster v. Lawson, 73 Wis. 561, 41 N. W. 710; Maingay v. Lewis, Ir. Rep. 5 C. L. 229 (revg. Ir. Rep. 3 C. L. 495).

[61] Smart v. Breckinridge Bank, 28 Ky. L. 646, 90 S. W. 5, 4 L. R. A. (N. S.) 800; Smith & Cheney Co. v. Schmidt, 142 Mich. 1, 105 N. W. 39.

[62] Oakeley v. Pasheller, 4 Clark & F. 207, 10 Bligh (N. S.) 548; Rouse v. Bradford Banking Co. [1894], A. C. 586; Maingay v. Lewis, Ir. Rep. 5 C. L. 229 (revg. Ir. Rep. 3 C. L. 495); Bailey v. Griffith, 40 U. C. Q. B. 418; Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124; MacIntyre v. Massey, 11 Ga. App. 458, 75 S. E. 814; Wiley v. Temple, 85 Ill. App. 69; Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Porter v. Baxter, 71 Minn. 195, 73 N. W. 844; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Carroll v. Sharp, 67 Misc. 254, 122 N. Y. S. 694; Phillips v. Mendelsohn, 67 Misc. 142, 121 N. Y. S. 913; Schmitt v. Greenberg, 58 Misc. 570, 109 N. Y. S. 88; Filippini v. Stead, 4 Misc. 405, 23 N. Y. S. 1061, 53 N. Y. St. 520; Akin v. Van Wirt, 124 App. Div. 83, 108 N. Y. S. 327; Palmer v. Purdy, 83 N. Y. 144; Morss v. Gleason, 64 N. Y. 204 (affg. 4 Thomp. & C. 274, 2 Hun 31); Millerd v. Thorn, 56 N. Y. 402, 15 Abb. Pr. (N. S.) 371; Reed v. Ashe, 18 App. Div. 501, 46 N. Y. S. 126; United States Nat. Bank v. Underwood, 2 App. Div. 342, 37 N. Y. S. 838, 73 N. Y. St. 50; Colgrove v. Tallman, 2 Lans. (N. Y.) 97; Thurber v. Corbin, 51 Barb. (N. Y.) 215, 36 How. Pr. 66; Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547n; Campbell v.

one case:[63] "Where one partner sells his interest in the partnership property to the other, with the agreement that the continuing partner shall assume and pay all the partnership debts and the sale is made with full knowledge, agreement and consent of the creditors of said partnership, the retiring partner, as a matter of law, ipso facto, becomes surety only for such debts, and if the creditors, having such knowledge of such agreement, consent thereto and permit the continuing partner to dissipate, or negligently lose, or dispose of, the partnership property, upon which they have a lien, the surety is discharged to the extent that he may be prejudiced thereby." However, there are several well-considered cases which hold that even as to a creditor with notice the original relation as joint debtor remains.[64] As said in one of these cases: "The question in controversy (and upon this there is a conflict of judicial opinion) is whether a creditor who is not a party to the agreement between the partners creating this new relation between them, and does not assent to it, but merely has notice of it, is bound by it, and must, after such

Floyd, 153 Pa. St. 84, 25 Atl. 1033; First Nat. Bank v. Larsen, 146 Wis. 653, 132 N. W. 610. The American cases so holding all go back to the case of Oakeley v. Pasheller, 4 Cl. & F. 207. It was said of this case, however, in the case of Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124: "In the case of Swire v. Redman, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakeley v. Pasheller [4 Cl. & F. 207], intend to rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners."

[63] Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547n.

[64] Freston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124; Brannum v. Wertheimer-Swartz Shoe Co., 117 Ala. 601, 23 So. 639; First Nat. Bank v. Cheney, 114 Ala. 536, 21 So. 1002; Hall v. Jones, 56 Ala. 493; Ridgley v. Robertson, 67 Mo. App. 45; Young v. Bell (N. J. Eq.), 41 Atl. 226; United States Nat. Bank v. Underwood, 2 App. Div. 342, 37 N. Y. S. 838, 73 N. Y. St. 50; McLaughlin v. Bieber, 56 N. Y. S. 490 (revd. 41 App. Div. 561, 58 N. Y. S. 790); Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. 783; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991; Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708 (limiting Johnson v. Young, 20 W. Va. 614). Contra: Gourley v. Tyler (Tex.), 4 Willson Civ. Cas. Ct. App., § 215, 15 S. W. 731.

notice, treat the retiring partner, not as a joint debtor, but as a surety. We have no hesitation in holding that, under such circumstances, the partners continue to be bound as joint debtors to the creditor, pursuant to their original obligation. In our view there is no reasonable ground for a difference of opinion upon this. The obligation of the partners to their creditor was created by contract. They were joint obligors. By the contract they subjected themselves to all of the obligations of that relation, and conferred upon their creditor all of the benefits arising from it. To sustain the doctrine that the partners can, by their own act, change the character of their obligation to their creditor, and without his assent, express or implied, violates the fundamental principles of the law of contract. It abrogates an express contract without the consent of the party beneficially interested, and forces upon him a new contract to which he has not given his assent. In Pingree on Suretyship and Guaranty, § 21, it is said that 'the great weight of authority is that two or more principal debtors can not, by agreement among themselves, without consent of the creditor, so change the character of the liability of one of them to such creditor from principal to surety, as to enable him to demand from the creditor the treatment of a surety for the debt; that is, a retiring partner or other principal debtor can not become a surety as to the creditor by simply informing him that his codebtors have agreed that he shall be held only as a surety.' "[65] Mere notice that one partner has retired or that one partner has purchased the interests of the other in the business is not notice of such purchaser's assumption of firm debts, and notice of assumption must be clear and specific in order to bind a creditor.[66] Under the rule that the re-

[65] Dean v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610.

[66] Wiley v. Temple, 85 Ill. App. 69; Skannel v. Taylor, 12 La. Ann. 773; Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223; Young v. Bell (N. J. Eq.), 41 Atl. 226; Palmer v. Purdy, 83 N. Y. 144; United States Nat. Bank v. Underwood, 2 App. Div. 342, 37 N. Y. S. 838, 73 N. Y. St. 50; Filippini v. Stead, 4 Misc. 405, 23 N. Y. S. 1061, 53 N. Y. St. 520; Maier v. Canavan, 8 Daly (N. Y.) 272; Umbarger v. Plume, 26 Barb. (N. Y.) 461.

tiring partner is liable to the creditors as surety, an agreement with the creditor extending the time of payment of the debt by the assuming partner discharges the retiring partner,[67] and the acceptance of the note of an assuming partner in payment of a debt has often been held to discharge the other partners.[68] A few states hold that a creditor of a partnership is not entitled to the benefit of the assumption of firm debts by a partner in absence of an agreement to that effect, but that he must follow the persons with whom he contracted, in order to recover.[69] But

[67] MacIntyre v. Massey, 11 Ga. App. 458, 75 S. E. 814; Brannum v. Wertheimer-Swartz Shoe Co., 117 Ala. 601, 23 So. 639; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124; Tootle v. Cook, 4 Colo. App. 111, 35 Pac. 193; Wiley v. Temple, 85 Ill. App. 69; Walter A. Wood Mowing &c. Mach. Co. v. Oliver, 103 Mich. 326, 61 N. W. 507; Leithauser v. Baumeister, 47 Minn. 151, 28 Am. St. 336, 49 N. W. 660; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90 (affg. 5 Hun 103); Millerd v. Thorn, 56 N. Y. 402, 15 Abb. Pr. (N. S.) 371; Filippini v. Stead, 4 Misc. 405, 23 N. Y. S. 1061, 53 N. Y. St. 520; Dodd v. Dreyfus, 17 Hun (N. Y.) 600, 57 How. Pr. 319; Morrison v. Perry, 11 Hun (N. Y.) 33; Brown v. Davis, 6 Duer (N. Y.) 549; Lazelle v. Miller, 40 Ore. 549, 67 Pac. 307; Oakeley v. Pasheller, 4 Clark & F. 207, 10 Bligh (N. S.) 548; Maingay v. Lewis, Ir. Rep. 5 C. L. 229 (revg. Ir. Rep. 3 C. L. 495); Rouse v. Bradford Banking Co. [1894], A. C. 586 (affg. [1894] 2 Ch. 32, 63 L. J. Ch. (N. S.) 890).

[68] Hoopes v. McCan, 19 La. Ann. 201; Smith v. Shelden, 35 Mich. 42, 25 Am. Rep. 529; Leithauser v. Baumeister, 47 Minn. 151, 28 Am. St. 336, 49 N. W. 660; Palmer v. Purdy, 83 N. Y. 144; Millerd v. Thorn, 56 N. Y. 402, 15 Abb. Pr. (N. S.) 371; Dodd v. Dreyfus, 17 Hun (N. Y.) 600, 57 How. Pr. 319; Thurber v. Corbin, 51 Barb. (N. Y.) 215, 36 How. Pr. 66; Reed v. Ashe, 18 App. Div. 501, 46 N. Y. S. 126; Bedford v. Deakin, 2 Barn. & Ald. 210, 2 Starkie 156.

[69] Atwood v. Lockhart, 4 McLean (U. S.) 350, Fed. Cas. No. 642; In re Isaacs, 3 Sawy. (U. S.) 35, 6 Nat. Bankr. Reg. 92, Fed. Cas. No. 7093; Lee v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Hicks v. Wyatt, 23 Ark. 55; Salter v. Edward Hines Lumber Co., 77 Ill. App. 97; Sternburg v. Callanan, 14 Iowa 251; Locke v. Hall, 9 Maine 133; Beall v. Poole, 27 Md. 645; Robb v. Mudge, 14 Gray (Mass.) 534; Wild v. Dean, 3 Allen (Mass.) 579; Childs v. Walker, 2 Allen (Mass.) 259; Ayres v. Gallup, 44 Mich. 13, 5 N. W. 1072; Hayes v. Knox, 41 Mich. 529, 2 N. W. 670; Spaunhorst v. Link, 46 Mo. 197; Manny v. Frasier, 27 Mo. 419; Parmalee v. Wiggenhorn, 6 Nebr. 322; Morehead v. Wriston, 73 N. Car. 398; Kountz v. Holthouse, 85 Pa. St. 235; Torrens v. Campbell, 74 Pa. St. 470; Campbell v. Lacock, 40 Pa. St. 448;

generally the American courts allow a creditor, whether or not he consented to an assumption of debts by one partner, to take advantage of it if he wishes and to elect to pursue the assuming partner for satisfaction of his debt.[70] In New York it seems to be the present rule that a creditor not consenting to a general assumption of firm debts may not take advantage of it, but may take advantage where the assumption is of particular debts or debts owing particular creditors.[71]

§ 559. Liability of continuing partners or new firm for obligations of old firm.—When a partner retires and the members of the old firm continue the business, they and the retiring partner are alike liable for the debts of the old firm under the ordinary rules of partnership liability heretofore discussed. If a new firm is organized, the new firm as such is not liable for the old firm's debts, except where it assumes them

Shoemaker v. King, 40 Pa. St. 107; McCarteney v. Wyoming Nat. Bank, 1 Wyo. 382; Ex parte Freeman, Buck. Bankr. 471.

[70] In re Downing, 1 Dill (U. S.) 33, Fed. Cas. No. 4044; Fish v. First Nat. Bank, 150 Fed. 524; Austin v. Seligman, 21 Blatchf. (U. S.) 506, 18 Fed. 519; Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609; Lehow v. Simonton, 3 Colo. 346; Williams v. Boyd, 75 Ind. 286; Way v. Fravel, 61 Ind. 162; Haggerty v. Johnston, 48 Ind. 41; Hardy v. Blazer, 29 Ind. 226, 92 Am. Dec. 347; Devol v. McIntosh, 23 Ind. 529; Case v. Ellis, 4 Ind. App. 224, 30 N. E. 907; Malanaphy v. Fuller & J. Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. 332; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223; Garvin v. Mobley, 1 Bush (Ky.) 48; Francis v. Smith, 1 Duv. (Ky.) 121; Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429; Dodge v. Cutrer, 100 Miss. 647, 56 So. 455; McKillip v. Cattle, 12 Nebr. 477, 11 N. W. 735; Hannigan v. Allen, 127 N. Y. 639, 27 N. E. 402; Allendorph v. Wheeler, 101 N. Y. 649, 5 N. E. 42; Arnold v. Nichols, 64 N. Y. 117; Barlow v. Myers, 64 N. Y. 41, 21 Am. Rep. 582; Merrill v. Green, 55 N. Y. 270; Claflin v. Ostrom, 54 N. Y. 581; Sinclair v. Galland, 8 Daly (N. Y.) 508; Reynolds v. Lawton, 62 Hun 596, 17 N. Y. S. 432, 43 N. Y. St. 578; Mackintosh v. Fatman, 38 How. Pr. (N. Y.) 145; Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122; Kimball v. Noyes, 17 Wis. 696.

[71] Wheat v. Rice, 97 N. Y. 296; Corner v. Mackey, 147 N. Y. 574, 42 N. E. 29 (affg. 73 Hun 236, 25 N. Y. S. 1023, 57 N. Y. St. 26); Serviss v. McDonnell, 107 N. Y. 260, 14 N. E. 314; Barlow v. Myers, 64 N. Y. 41, 21 Am. Rep. 582.

expressly,[72] or such assumption may be implied from conduct.[73] So, participation in the benefits of continuing contracts of the old firm,[74] or admission or recognition of liability on the debt,[75] or entries of obligations on the books of the new firm,[76] or giving a note of the new firm for a debt of the old, with the consent

[72] Starr v. Stiles, 2 Ariz. 436, 19 Pac. 225; Bank of Commerce v. Ada County Abstract Co., 11 Idaho 756, 85 Pac. 919; Weil v. Jaeger, 174 Ill. 133, 51 N. E. 196 (affg. 73 Ill. App. 271); Davis Sewing Mach. Co. v. Buckles, 89 Ill. 237; Waller v. Davis, 59 Iowa 103, 12 N. W. 798; Shelton v. Baer, 90 Mo. App. 286; Stirn v. Hemken, 72 Hun 91, 25 N. Y. S. 583, 55 N. Y. St. 759; In re Ryan, 70 Hun 164, 24 N. Y. S. 273, 53 N. Y. St. 922; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192; Dockery v. Faulkner (Tex. Civ. App.), 101 S. W. 501 (1907); Cranfurd v. Cocks, 6 Exch. 287, 20 L. J. Exch. 169.

[73] Leavenworth v. Brandon, 76 Wash. 394, 136 Pac. 375; Edmondson v. Barrell, 2 Cranch (U. S.) 228, Fed. Cas. No. 4284; Smith v. Ledyard, 49 Ala. 279; Freeman v. Badgley, 105 Cal. 372, 38 Pac. 955; Frazer v. Howe, 106 Ill. 563; Karraker v. Eddleman, 101 Ill. App. 23; Salter v. Edward Hines Lumber Co., 77 Ill. App. 97; Drake v. Hays, 27 La. Ann. 256; Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88 (applying Rev. Laws, ch. 90, § 4); Tay v. Ladd, 15 Gray (Mass.) 296, 77 Am. Dec. 364; La Montagne v. Bank of New York Nat. Banking Assn., 183 N. Y. 173, 76 N. E. 33; Peyser v. Myers, 135 N. Y. 599, 32 N. E. 699; Hannigan v. Allen, 127 N. Y. 639, 27 N. E. 402; Fagely v. Bellas, 17 Pa. St. 67; Ash v. Werner, 12 Pa. Super. Ct. 39; Gwinn v. Lee, 6 Pa. Super. Ct. 646, 42 Wkly. Notes Cas. 124; Meyberg v. Steagall, 51 Tex. 351.

[74] Freeman v. Huttig Sash & Door Co. (Tex.), 153 S. W. 122; Rogers v. Riessner, 30 Fed. 525; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192 (revg. 77 Ill. App. 365); Frazer v. Howe, 106 Ill. 563; McCracken v. Milhous, 7 Ill. App. 169; Giddings v. Sievers, 24 Md. 363; Wilgus v. Lewis, 8 Mo. App. 336; Sizer v. Ray, 87 N. Y. 220; Durand v. Curtis, 57 N. Y. 7; Fuller v. Rowe, 59 Barb. (N. Y.) 344; Keller v. West, B. & C. Mfg. Co., 39 Hun (N. Y.) 348; Pierce v. Alspaugh, 83 N. Car. 258; Brooke v. Evans, 5 Watts (Pa.) 196; Allen v. Atchison, 26 Tex. 616; Barlow v. Wainwright, 2 Vt. 88, 52 Am. Dec. 79; York v. Orton, 65 Wis. 6, 26 N. W. 166; Dyke v. Brewer, 2 Car. & K. 828; Helsby v. Mears, 5 Barn. & C. 504.

[75] Salter v. Edward Hines Lumber Co., 77 Ill. App. 97; Love v. Adams, 23 La. Ann. 66; Shaw v. McGregory, 105 Mass. 96; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Wright v. Carman, 47 N. Y. St. 125, 19 N. Y. S. 696; Bate v. McDowell, 17 Jones & S. (N. Y.) 106; White v. Thielens, 106 Pa. St. 173; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[76] Cadwallader v. Blair, 18 Iowa 420; Sternburg v. Callanan, 14 Iowa 251; Cross v. Burlington Nat. Bank, 17 Kans. 336; Ex parte Griffin, 3 Ont. App. Rep. 1.

of all partners,[77] may be sufficient to charge the new firm with assumption of the debts of the old. But merely a recognition that the firm property is liable for old firm debts, does not make a new partner personally liable.[78] It has been held that the agreement of the new firm to pay debts of the old one, must be consented to by all members of the new one.[79] A firm may be bound when a member applies its funds in paying a debt of an old firm of which he was a member, to a creditor who did not know of the change,[80] but such partner would be liable to contribute to his copartners.[81] And where there is a purchase of a partner's interest in a firm by copartners who continue the business and have agreed to apply partnership property to the debts of the firm they take the assets subject to a trust in favor of the creditors of the old firm.[82] But the general rule is that a sale of a partner's interest in a partnership to a copartner deprives the creditors of any right to assert the retiring partner's lien on the partnership property even though the sale was made upon a contract including the assumption of firm debts by the

[77] Morris v. Marqueze, 74 Ga. 86; Silverman v. Chase, 90 Ill. 37; Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. 336; Spaunhorst v. Link, 46 Mo. 197; Goodrich v. Clute, 50 Hun 605, 3 N. Y. S. 102, 20 N. Y. St. 662 (affd. in 117 N. Y. 633, 22 N. E. 1129); Morrison v. Perry, 11 Hun (N. Y.) 33; Howell v. Wilcox & G. Sewing Mach. Co., 12 Nebr. 177, 10 N. W. 700; Rice v. Wolff, 65 Wis. 1, 26 N. W. 181.

[78] Freeman v. Huttig Sash & Door Co. (Tex.), 153 S. W. 122.

[79] Webb v. Butler (Ala.), 68 So. 369.

[80] Newhall v. Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. 712.

[81] In re Raiguel's Appeal, 80 Pa. St. 234.

[82] Liquidating Comrs. of Bank of Monroe v. Dodson, 131 La. 990, 60 So. 659; Sedam v. Williams, 4 McLean (U. S.) 51, Fed. Cas. No. 12609; Marsh v. Bennett, 5 McLean (U. S.) 117, Fed. Cas. No. 9110; Lee v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Cobb v. Benedict, 27 Colo. 342, 62 Pac. 222; Robinson v. Roos, 138 Ill. 550, 28 N. E. 821; Silverman v. Chase, 90 Ill. 37; Edens v. Williams, 36 Ill. 252; Peyton v. Lewis, 12 B. Mon. (Ky.) 356; Bowman v. Spalding, 8 Ky. L. 691, 2 S. W. 911; Topliff v. Jackson, 12 Gray (Mass.) 565; Shattuck v. Lawson, 10 Gray (Mass.) 405; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448 (affd. 65 N. J. Eq. 404, 54 Atl. 1125); Morss v. Gleason, 64 N. Y. 204 (affg. 2 Hun 31, 4 Thomp. & C. 274); Earon v. Mackey, 106 Pa. St. 452; White v. Magann, 65 Wis. 86, 26 N. W. 260.

purchaser.[83] There are a few cases to the contrary.[84] A mere participation in the benefits of previous contracts or transactions is not sufficient to make the new firm liable.[85] A few cases hold that a promise of a new firm, some of whose members were partners in the old, to pay debts of the old firm is a promise to pay the debts of another, which must be in writing under the statute of frauds.[86] Such is not the general rule, since an incoming partner who purchased the interest of the old partners and agreed to assume the debts is only paying his own debts incurred

[83] Freeman v. Huttig Sash & Door Co. (Tex.), 153 S. W. 122; West v. Chasten, 12 Fla. 315; Griffin v. Orman, 9 Fla. 22; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Ladd v. Griswold, 9 Ill. 25, 46 Am. Dec. 443; Williamson v. Adams, 16 Ill. App. 564; Warren v. Farmer, 100 Ind. 593; Maquoketa v. Willey, 35 Iowa 323; Griffith v. Buck, 13 Md. 102; Robb v. Mudge, 14 Gray (Mass.) 534; Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223; Fulton v. Hughes, 63 Miss. 61; Dimon v. Hazard, 32 N. Y. 65; Robb v. Stevens, 1 Clarke Ch. (N. Y.) 191; Cory v. Long, 2 Sweeney (N. Y.) 491; Rankin v. Jones, 55 N. Car. 169; In re Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752; Doty v. Crawford, 39 S. Car. 1, 17 S. E. 377; Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Croone v. Bivens, 2 Head (Tenn.) 339; Blackwell v. Farmers' & Merchants' Nat. Bank, 97 Tex. 445, 79 S. W. 518; White v. Parish, 20 Tex. 688, 73 Am. Dec. 204; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065; Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. 887; Webster v. Lawson, 73 Wis. 561, 41 N. W. 710; Ex parte Ruffin, 6 Ves. Jr. 119.

[84] Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378; Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Caldwell v. Scott, 54 N. H. 414; Tenney v. Johnson, 43 N. H. 144.

[85] Freeman v. Huttig Sash & Door Co. (Tex.), 153 S. W. 122; Baxter v. Plunkett, 4 Houst. (Del.) 450; Goodenow v. Jones, 75 Ill. 48; Watt v. Kirby, 15 Ill. 200; Gauss v. Hobbs, 18 Kans. 500; Mousseau v. Thebens, 19 La. Ann. 516; Parmalee v. Wiggenhorn, 6 Nebr. 322; Ayrault v. Chamberlin, 26 Barb. (N. Y.) 83; Shamburg v. Ruggles, 83 Pa. St. 148; Babcock v. Stewart, 58 Pa. St. 179; Brooke v. Evans, 5 Watts (Pa.) 196; Poindexter v. Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192; Beale v. Mouls, 10 Q. B. 976. But compare Markham v. Hazen, 48 Ga. 570; Johnson v. Barry, 95 Ill. 483; McCracken v. Milhous, 7 Ill. App. 169; Smith v. Hood, 4 Ill. App. 360; Nichols v. Prince, 8 Allen (Mass.) 404; Dix v. Otis, 5 Pick. (Mass.) 38; Kearney v. Snodgrass, 12 Ore. 311, 7 Pac. 309.

[86] Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Freeman v. Badgley, 105 Cal. 372, 38 Pac. 955; Sternburg v. Callanan, 14 Iowa 251; Shoemaker v. King, 40 Pa. St. 107.

by the purchase.[87] Nor is the new firm liable for the debts of an old firm merely because one of the members of the former was also a member of the latter.[88]

§ 560. Liability under Uniform Partnership Act of persons continuing business.—One of the most important changes made in the commonly accepted law by the Uniform Partnership Act relates to the liability of partners continuing a business after retirement of a partner and the assignment of his interests or admission of a new partner, without liquidation of the business. The act makes the creditors of the first or dissolved partnership also creditors of the partnership continuing the business. The provisions of the act are as follows:[89] (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business. (2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation

[87] Bessemer Sav. Bank v. Rosenbaum Grocery Co., 137 Ala. 530, 34 So. 609; Lee v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505; McKenzie v. Jackson, 4 Ala. 230; Dickson v. Conde, 148 Ind. 279, 46 N. E. 998; Haggerty v. Johnston, 48 Ind. 41; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223; Reynolds v. Lawton, 62 Hun 596, 17 N. Y. S. 432, 43 N. Y. St. 578; Wright v. Carman, 47 N. Y. St. 125, 19 N. Y. S. 696; Schindler v. Euell, 45 How. Pr. (N. Y.) 33, 4 Daly 553; First Nat. Bank v. Eichelberger, 1 Woodw. Dec. (Pa.) 397; McCreary v. Van Hook, 35 Tex. 631; Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122. To same effect, Wear-Boogher Dry Goods Co. v. Kelly, 84 Miss. 236, 36 So. 258; Shufeldt v. Smith, 139 Mo. 367, 40 S. W. 887; Bartlett v. Smith, 5 Nebr. (Unof.) 337, 98 N. W. 687; Lyon v. Clochessy, 43 Misc. 67, 86 N. Y. S. 245; Don Yook v. Washington Mill Co., 16 Wash. 459, 47 Pac. 964.

[88] Ball v. Mashburn, 110 Ga. 285, 34 S. E. 851; Freeman v. Huttig Sash & Door Co. (Tex.), 153 S. W. 122.

[89] Uniform Partnership Act, § 41.

of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business. (3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made. (4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business. (5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business. (6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business. (7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only. (8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved part-

nership or on account of any consideration promised for such interest or for his right in partnership property. (9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud. (10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

§ 561. Liability of incoming partner for obligations of old firm.—The Uniform Partnership Act has made a marked change in the general law as to the liability of an incoming partner for the debts of the old firm. It provides that: "A person admitted as a partner into an existing partnership is liable for the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred except that this liability shall be satisfied only out of partnership property."[90] The effect of this, however, is only to make the partnership property liable for debts of the old firm, but it seems this liability would extend to any partnership property, although purchased by the new firm, and not merely to property transferred from the old firm. The general rule where the Uniform Partnership Act has not been adopted is that an incoming partner is not liable for the debts of the firm contracted prior to his becoming a member in the absence of an assumption of liability on his part,[91] and he becomes liable only by express agreement,[92] or where a special promise may be implied

[90] Uniform Partnership Act, § 17.

[91] Butler v. Henry, 48 Ark. 551, 3 S. W. 878; Smith v. Millard, 77 Cal. 440, 19 Pac. 824; Nix v. First Nat. Bank, 23 Colo. 511, 48 Pac. 522; Wright v. Brosseau, 73 Ill. 381; Mellor v. Lawyer, 55 Ill. App. 679; Sternburg v. Callanan, 14 Iowa 251; Cross v. Burlington Nat. Bank, 17 Kans. 336; Meador v. Hughes, 14 Bush (Ky.) 652; Beall v. Poole, 27 Md. 645; Hart v. Kelley, 83 Pa. St. 286; Shamburg v. Ruggles, 83 Pa. St. 148; Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340; Freeman v. Huttig Sach & Door Co. (Tex.), 153 S. W. 122 (revg. judgment (Civ. App.) 135 S. W. 740).

[92] Atwood v. Lockhart, 4 McLean

from his conduct[93] or he, by his conduct, becomes impliedly liable.[94] Neither does the purchaser of a partner's interest in an ordinary partnership become liable for firm debts.[95] And

(U. S.) 350, Fed. Cas. No. 642; Humes v. Higman, 145 Ala. 215, 40 So. 128; Tillis v. Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. 31; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; San Luis Obispo First Nat. Bank v. Simmons, 98 Cal. 287, 33 Pac. 197; Ball v. Mashburn, 110 Ga. 285, 34 S. E. 851; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Bank of Commerce v. Ada County Abstract Co., 11 Idaho, 756, 85 Pac. 919; Wright v. Brosseau, 73 Ill. 381; Karraker v. Eddleman, 101 Ill. App. 23; Hoyt v. Hasse, 80 Ill. App. 187; Salter v. Edward Hines Lumber Co., 77 Ill. App. 97; Mellor v. Lawyer, 55 Ill. App. 679; Rohlfing v. Carper, 53 Kans. 251, 36 Pac. 336; Meador v. Hughes, 14 Bush (Ky.) 652; Silliman v. Short, 26 La. Ann. 512; Hughes v. Waldo, 14 La. Ann. 348; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. 375, 32 L. R. A. 620; Ayres v. Gallup, 44 Mich. 13, 5 N. W. 1072; Lake v. Munford, 4 Sm. & M. (Miss.) 312; Deere v. Plant, 42 Mo. 60; Friedman v. Engel, 93 Mo. App. 464, 67 S. W. 725; Parmalee v. Wiggenhorn, 6 Nebr. 322; Serviss v. McDonnell, 107 N. Y. 260, 14 N. E. 314; Fuller v. Rowe, 57 N. Y. 23 (revg. 59 Barb. 344); Matter of Hoagland, 79 App. Div. 56, 79 N. Y. S. 1080; Matter of Sheldon, 72 App. Div. 625, 76 N. Y. S. 278 (affd. 173 N. Y. 287, 65 N. E. 1096); Morehead v. Wriston, 73 N. Car. 398; Strickler v. Gitchel, 14 Okla. 523, 78 Pac. 94; Kountz v. Holthouse, 85 Pa. St. 235; Babcock v. Stewart, 58 Pa. St. 179; Ash v. Werner, 12 Pa. Super. Ct. 39; Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea (Tenn.) 358; Adkins v. Arthur, 33 Tex. 431; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858; Oliver v. Moore (Tex.), 43 S. W. 812 (1897); Heidenheimer v. Franklin, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 840; Hart v. Tomlinson, 2 Vt. 101; Peters v. McWilliams, 78 Va. 567; Poindexter v. Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; Wolff v. Madden, 6 Wash. 514, 33 Pac. 975; Reddington v. Franey, 124 Wis. 590, 102 N. W. 1065; British Home Assur. Corp. v. Paterson (1902), 2 Ch. 404, 71 L. J. Ch. 872; Cripps v. Tappin, 1 Cab. & E. 13; Shirreff v. Wilks, 1 East 48, 5 R. R. 509; Mittleberger v. Merritt, 1 U. C. Q. B. 330; Eng. Partn. Act (1890), § 17 (i).

[93] Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Smith v. Millard, 77 Cal. 440, 19 Pac. 824; Morris v. Marqueze, 74 Ga. 86; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Karraker v. Eddleman, 101 Ill. App. 23; Beall v. Poole, 27 Md. 645; Dodge v. Cutrer, 100 Miss. 647, 56 So. 455; Peters v. McWilliams, 78 Va. 567.

[94] Rogers v. Riessner, 30 Fed. 525; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192 (revg.. 77 Ill. App. 365); McCracken v. Milhous, 7 Ill. App. 169; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471 (affg. 24 App. Div. 330, 48 N. Y. S. 492); Kearney v. Snodgrass, 12 Ore. 311, 7 Pac. 309; Scott v. Beale, 6 Jur. (N. S.) 559.

[95] Nix v. First Nat. Bank, 23 Colo. 511, 48 Pac. 522; Galigher v. Lockhart, 11 Mont. 109, 27 Pac. 446;

it is usually held that when a partner enters an existing firm and no specific new agreement of partnership is drawn up, that the business is to be conducted under the terms of the old partnership articles.[96] The purchaser who assumes particular debts is not liable for others not known to him.[97] An incoming partner with knowledge may be liable for breach of a contract or fraud in regard to a contract, though such breach or fraud occurred before the transfer.[98]

§ 562. **Novation—Application of payments.**—In order to establish a novation of a debt of an old firm by the substitution of a debt of the continuing partners or of a new firm, there must be a valid contract between the creditor and the parties whose obligation is thus substituted.[99] Such a novation is not shown merely by the creditor's assent to the assumption of firm debts by the new firm or continuing partners,[1] and has not always

Wright v. Kelley, 4 Lans. (N. Y.) 57; Dodson v. Downey [1901], 2 Ch. 620, 70 L. J. Ch. 854.

[96] Wilson v. Lineberger, 83 N. Car. 524; Austen v. Boys, 2 De G. & J. 626, 4 Jur. (N. S.) 719, 27 L. J. Ch. 714, 6 W. R. 792. See § 225 on continuation of firm.

[97] McGilvery v. McGilvery, 23 Idaho 116, 128 Pac. 978.

[98] Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Kinney County Land Co. v. Cubbage (Tex. Civ. App.), 155 S. W. 591.

[99] Cal. Civ. Code, § 1530. Regester v. Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. (N. Y.) 107; Sternburg v. Callanan, 14 Iowa 251; Spaunhorst v. Link, 46 Mo. 197; Fagan v. Long, 30 Mo. 222; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Frye v. Phillips (1907), 46 Wash. 190, 89 Pac. 559; Ex parte Lloyd, 1 Glyn & J. 389, 2 L. J. Ch. (O. S.) 162; Gurney v. Braden, L. R. 3 Brit. Col. 474.

[1] Chapin v. Brown (Cal.), 34 Pac. 525 (1893); Silverman v. Chase, 90 Ill. 37; Morrison v. Kendall, 6 Ind. App. 212, 33 N. E. 370; Frentress v. Markle, 2 G. Greene (Iowa) 553; Chase v. Vaughan, 30 Maine 412; Motley v. Wickoff, 113 Mich. 231, 71 N. W. 520; Mitchell v. Dobson, 42 N. Car. 34; Campbell v. Floyd, 153 Pa. St. 84, 25 Atl. 1033; Blew v. Wyatt, 5 C. & P. 397, 24 E. C. L. 623; Kirwan v. Kirwan, 2 Cromp. & M. 617, 3 L. J. Exch. 187, 4 Tyr. 491; In re Smith, L. R. 4 Ch. App. Cas. 662, 20 L. T. Rep. (N. S.) 835; In re Tucker [1894], 3 Ch. 429, 63 L. J. Ch. 737; Rouse v. Bradford Banking Co. [1894], 2 Ch. 32, 63 L. J. Ch. 337, 7 R. 127, 70 L. T. 427; In re Head [1893], 3 Ch. 426, 63 L. J. Ch. 35; Benson v. Hadfield, 4 Hare 32; Eyton v. Knight, 2 Jur. 8; Osborne v. Henderson, 18 Can. Sup. Ct. 698. See also Canadian Bank v. Marks, 19 Ont. 450.

been held to result where such creditor took a note of the new firm for the old debt,[2] although a novation need not be established by an express contract, but may be implied from the acts of the creditor.[3] If debts of the old firm have been assumed by the new one the members of the new firm may require payments made by the new firm to a creditor of the old firm who has continued to deal with the new one, to be applied either to the new or to the old indebtedness,[4] otherwise it is the right and duty of the creditor to apply the payment to the oldest items of the account.[5] If there has been no assumption of debts by the

[2] First Nat. Bank v. Cheney, 114 Ala. 536, 21 So. 1002; Powell v. Blow, 34 Mo. 485; Nightingale v. Chafee, 11 R. I. 609, 23 Am. Rep. 531; Lewis v. Davidson, 39 Tex. 660; Wadhams v. Page, 6 Wash. 103, 32 Pac. 1068; Spenceley v. Greenwood, 1 F. & F. 297.

[3] Harris v. Lindsay, Fed. Cas. No. 6124, 4 Wash. (U. S.) 271, Fed. Cas. No. 6123, 4 Wash. (U. S.) 98; Regester v. Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. (N. Y.) 107; Venable v. Stevens, 94 Ga. 281, 21 S. E. 516; Hellman v. Schwartz, 44 Ill. App. 84; Rusk v. Gray, 83 Ind. 589; McNeal v. Blackburn, 7 Dana (Ky.) 170; Hoopes v. McCan, 19 La. Ann. 201; Consalus v. McConihe, 119 N. Y. 652, 23 N. E. 1150 (affg. 2 N. Y. S. 89, 49 Hun 609, 17 N. Y. St. 538); Ludington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601; Filippini v. Stead, 4 Misc. 405, 23 N. Y. S. 1061, 53 N. Y. St. 520; Earon v. Mackey, 106 Pa. St. 452; Kaufman v. Kaufman, 2 Woodw. Dec. (Pa.) 98; Frye v. Phillips (1907), 46 Wash. 190, 89 Pac. 559; Harris v. Farwell, 15 Beav. 31, 15 L. J. Ch. 185, 51 Eng. Reprint 447; In re Family Endowment Soc., L. R. 5 Ch. 118, 39 L. J. Ch. 306; Rolfe v. Flower, L. R. 1 P. C. 27, 12 Jur. (N. S.) 345, 35 L. J. C. P. 13, 14 L. T. 144, 14 W. R. 773; In re Head (1894), 2 Ch. 236, 63 L. J. Ch. 549; Bilborough v. Holmes, 5 Ch. D. 255, 46 L. J. Ch. 446, 35 L. T. 75, 25 W. R. 297; Brown v. Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 W. R. 2; Mills v. Boyd, 6 Jur. 943; Ex parte Oakes, 5 Jur. 757, 10 L. J. Bankr. 69; Ex parte Smith, 2 Mont. D. & De G. 314; Seyfang v. Mann, 25 Ont. App. 179 (modifying 27 Ont. 631); Watts v. Robinson, 32 U. C. Q. B. 362; Eng. Partn. Act (1890), § 17.

[4] King v. Sutton, 42 Kans. 600, 22 Pac. 695; Rutherford v. Schattman, 117 N. Y. 658, 22 N. E. 1133 (affg. 1 N. Y. S. 741); Weaver v. White, 64 Hun 636, 19 N. Y. S. 616, 46 N. Y. St. 467; Henry v. Dietrich, 7 N. Y. S. 505.

[5] Fairchild v. Holly, 10 Conn. 175; Schoonover v. Osborne, 108 Iowa 453, 79 N. W. 263; Allcott v. Strong, 9 Cush. (Mass.) 323; Pineiro v. Gurney, 60 Hun 584, 15 N. Y. S. 217, 39 N. Y. St. 469; Thurber v. McIntire, 45 Hun 590, 9 N. Y. St. 816; Searington v. Ellison, 1 Ohio Dec. (Reprint) 74, 1 West L. J. 488; Paul v. Ellison, 1 Ohio Dec. (Reprint) 67, 1 West L. J. 452; Morgan v. Tarbell, 28 Vt. 498; Robbins v. Lincoln, 12

new firm, a creditor of both the old and the new firm can not apply money coming from one firm to a debt of the other.[6]

§ 563. Liability of retiring partner for new firm's obligations.—A retiring partner who has given due notice of his retirement is not liable on any obligations of the new firm incurred after his retirement,[7] since the members of the new firm have no power to bind him to a new obligation.[8] But he is liable upon any contracts entered into before his retirement, which are not consummated until afterward, and the undertaking of the new firm to assume such contracts will not discharge him as to the other party to the obligation.[9] A retiring partner is also liable on obligations occurring after his retirement, but

Wis. 1; Laing v. Campbell, 36 Beav. 3, 55 Eng. Reprint 1057; Copland v. Toulmin, 7 Cl. & F. 349, West 164; Clayton's Case, 1 Meriv. 572, 15 Rev. Rep. 161, 35 Eng. Reprint 781; Hooper v. Keay, 1 Q. B. D. 178, 34 L. T. Rep. (N. S.) 574.

[6] Burns v Pillsbury, 17 N. H. 66; Scott v. Kent, 54 N. Y. Super. Ct. 257; In re Shenk's Appeal, 33 Pa. St. 371; St. Louis Type Foundry Co. v. Wisdom, 4 Lea (Tenn.) 695; Eaton v. Whitcomb, 17 Vt. 641; Jones v. Maund, 3 Y. & C. Exch. 347.

[7] Penn. Nat. Bank v. Furness, 114 U. S. 376, 5 Sup. Ct. 900, 29 L. ed. 168; Dixie Cotton Oil Co. v. Morris, 79 Ark. 113, 94 S. W. 933; Smith v. Kansas St. Imp. Co., 120 Cal. 517, 52 Pac. 811, 53 Pac. 167; Askew v. Silman, 95 Ga. 678, 22 S. E. 573; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Ellis v. Bronson, 40 Ill. 455; Violett v. Fairchild, 6 La. Ann. 193; Porter v. Baxter, 71 Minn. 195, 73 N. W. 844; Henry v. Mahone, 23 Mo. App. 83; Adams v. Albert, 155 N. Y. 356, 49 N. E. 929, 63 Am. St. 675 (revg. 87 Hun 471, 34 N. Y. S. 328, 68 N. Y. St. 479); Pringle v. Leverich, 97 N. Y. 181, 49 Am. Rep. 522; Ferrari v. Saitta, 82 Hun 613, 31 N. Y. S. 14, 63 N. Y. St. 352; Hartley v. Kirlin, 45 Pa. St. 49; Cooley v. Farmers' Co-operative Bank, 18 Pa. Co. Ct. 366; Mathews v. Colburn, 1 Strobh. L. (S. Car.) 258; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Hart v. Alexander, 7 C. & P. 746, 6 L. J. Exch. 129, 2 M. & W. 484, M. & H. 63; McIver v. Humble, 16 East 169.

[8] MacIntyre v. Massey, 11 Ga. App. 458, 75 S. E. 814.

[9] Hatchell v. Chew, 58 S. W. 816, 22 Ky. L. 738; McDonald v. Millaudon, 5 La. 403; Bernard v. Torrance, 5 Gill & J. (Md.) 383; Sample v. Pickard, 74 Mich. 416, 42 N. W. 54; Goodspeed v. South Bend Chilled Plow Co., 45 Mich. 237, 7 N. W. 810; Tutt v. Cloney, 62 Mo. 116; James v. Pope, 19 N. Y. 324; Briggs v. Briggs, 15 N. Y. 471 (affg. 20 Barb. 477); Merrill v. Blanchard, 7 App. Div. 167, 40 N. Y. S. 48, 74 N. Y. St. 661 (affd. 158 N. Y. 682, 52 N. E. 1125); Court v. Berlin (1897), 2 Q. B. 396, 66 L. J. Q. B. 714, 77 L. T. 293, 46 W. R. 55; Dob-

before notice has been given to persons so entitled.[10] However, a dormant partner who retires is not under the necessity of giving notice.[11] The general rule is that actual notice of dissolution or knowledge equivalent thereto is necessary to persons who formerly did business with the old firm; notice by publication is sufficient as to persons who never dealt with the old firm.[12] The fact that the remaining partner manages the business which is carried on in the same place under the same name is not a circumstance sufficient to put upon notice one who formerly dealt with the firm,[13] nor is the recording of a chattel mortgage in favor of a retiring partner.[14] It has been held that notice to the public is essential in

bin v. Foster, 1 Car. & K. 323; Oakford v. European &c. Steam Shipping Co., 1 Hem. & M. 182, 9 L. T. 15; Eng. Partn. Act (1890), § 17 (2).

[10] Reinhart Grocery Co. v. Benld Mercantile Co., 176 Ill. App. 507; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Ellis v. Bronson, 40 Ill. 455; Sprague v. Keltie Stone Co., 123 Ill. App. 616; Easton v. Wostenholm, 137 Fed. 524, 70 C. C. A. 108; Neal v. Smith, 116 Fed. 20, 54 C. C. A. 226; Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Pomeroy v. Coons, 20 Mo. 598; Clapp v. Rogers, 12 N. Y. 283; Wardwell v. Haight, 2 Barb. (N. Y.) 549; National Bank v. Norton, 1 Hill (N. Y.) 572; Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183; Alexander v. Harkins, 120 N. Car. 452, 27 S. E. 120; Wilder v. Block, 10 Ohio Dec. (Reprint) 162, 19 Cinc. L. Bul. 105; Rodgers-Wade Furniture Co. v. Wynn (Tex. Civ. App), 156 S. W. 340; Thompson v. Harmon (Tex. Civ. App.), 152 S. W. 1161; Miller v. Laughlin (Tex. Civ. App.), 147 S. W. 711; Wood v. Jefferies (Va.), 83 S. E. 1074; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Scarf v. Jardine, 7 App. Cas. 345, 51 L. J. Q. B. 612; Hart v. Alexander, 7 C. P. 746, 6 L. J. Exch. 129, 2 M. & W. 484, M. & H. 63; Parkin v. Carruthers, 3 Esp. 248, 6 Rev. Rep. 828; Reid v. Coleman, 19 Ont. 93.

[11] Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Ellis v. Bronson, 40 Ill. 455; Davis v. Allen, 3 N. Y. 168; McFarland v. McHugh, 12 Ohio Cir. Ct. 485, 5 Ohio Cir. Dec. 546; Benton v. Chamberlain, 23 Vt. 711; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Carter v. Whalley, 1 B. & Ad. 11, 8 L. J. K. B. (O. S.) 340.

[12] Wood v. Jefferies (Va.), 83 S. E. 1074; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Sprague v. Keltie Stone Co., 123 Ill. App. 616. See also Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Clapp v. Rogers, 12 N. Y. 283; Wardwell v. Haight, 2 Barb. (N. Y.) 549; National Bank v. Norton, 1 Hill (N. Y.) 572.

[13] Reinhart Grocery Co. v. Benld Mercantile Co., 176 Ill. App. 507.

[14] Simmons Hardware Co. v. Peck, 176 Mo. App. 86, 162 S. W. 1061.

order to relieve a retiring partner from liability to persons who had never dealt with the old firm.[15] On the other hand, it is held that when a creditor did not know of certain persons' connection with the firm, and they retired before credit was extended, they are not liable for the debt, and notice is immaterial,[16] and that notice is not necessary for a retiring partner to escape liability to one who dealt with the firm first after a partner's retirement, when there was nothing to induce a belief that he was still a member,[17] and that one who has previously dealt with the firm can not hold a retiring partner unless credit was extended on the faith of his membership.[18] By the Uniform Partnership Act it is only necessary that actual notice be given to persons who have extended credit to the firm.[19] The general rules applicable to notice are treated more fully under the head of dissolution and the rules applicable to notice of dissolution and notice of retirement are substantially similar.[20] A retiring partner who leaves the liquidation of firm affairs in the hands of the remaining partner, authorizes him to employ the ordinary methods of meeting firm obligations, such as drawing checks in the firm name, but after notice to a bank not to extend credit, the retiring partner will not be bound by a note in the firm name.[21] Under the Georgia code a retiring partner can not be bound by the act of the continuing partners in renewing or continuing a firm obligation.[22]

§ 564. Liability to retiring partner on breach of agreement to assume firm debts.—If the retiring partner is compelled to pay debts of the old firm which have been assumed by the new firm or continuing partners, he may hold the one as-

[15] Wood v. Jefferies (Va.), 83 S. E. 1074.

[16] Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030.

[17] Raywinkle v. Southern Coal Co. (Ark.), 174 S. W. 524.

[18] Simmons Hardware Co. v. Peck, 176 Mo. App. 86, 162 S. W. 1061.

[19] Uniform Partnership Act, § 35 (a). See Hendley v. Bittinger (Pa.), 94 Atl. 831.

[20] See § 594 et seq.

[21] First Nat. Bank of Antigo v. Larsen, 146 Wis. 653, 132 N. W. 610.

[22] MacIntyre v. Massey, 11 Ga. App. 458, 75 S. E. 814.

suming such debts for the amount he was forced to pay,[23] and for necessary expenses connected with such payment.[24] This right may be enforced by action at law,[25] or by suit in equity.[26] The assuming partner is liable for breach of his agreement to pay firm debts by mere nonpayment, and the retiring partner may maintain a suit upon such failure to pay without having paid anything himself.[27] Sometimes the continuing partners execute to the retiring partner a contract indemnifying him

[23] Robinson v. Roos, 138 Ill. 550, 28 N. E. 821; Warbritton v. Cameron, 10 Ind. 302; Kibby v. Kimball, 63 Iowa 665, 19 N. W. 825; Brewer v. Worthington, 10 Allen (Mass.) 329; Nichols v. Prince, 8 Allen (Mass.) 404; Shamp v. Meyer, 20 Nebr. 223, 29 N. W. 379; Thurber v. Corbin, 51 Barb. (N. Y.) 215.

[24] Wright v. Sewall, 9 Rob. (La.) 128; Drake v. Porter, 13 Hun (N. Y.) 658.

[25] Burney v. Boone, 32 Ala. 486; Meyer v. Parsons, 129 Cal. 653, 62 Pac. 216; Dickenson v. Moore, 117 Ga. 887, 45 S. E. 240; Tucker v. Murphy, 114 Ga. 662, 40 S.E. 836; Teed v. Parsons, 100 Ill. App. 342 (revd. 202 Ill. 455, 66 N. E. 1044); Jackson v. Hart, 12 Ind. 605; Nichols v. Prince, 8 Allen (Mass.) 404; Scovill v. Kinsley, 13 Gray (Mass.) 5; Berridge v. Slawson, 94 Mich. 484, 54 N. W. 278; Gardiner v. Fargo, 58 Mich. 72, 24 N. W. 655; Osborn v. Osborn, 36 Mich. 48; McCarthy v. Donnelly, 90 Minn. 104, 95 N. W. 760; Meyer v. Shamp, 26 Nebr. 729, 42 N. W. 757; Huffman v. Huffman, 63 S. Car. 1, 40 S. E. 963; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634; Brazee v. Woods, 35 Tex. 302.

[26] Scovill v. Kinsley, 13 Gray (Mass.) 5; Fay v. Finley, 14 Phila. (Pa.) 206; Allen v. Cooley, 53 S. Car. 77, 30 S. E. 721. But see Dyer v. Dyer, 138 Ga. 159, 74 S. E. 1030, where rights of a mortgagee intervened.

[27] Hood v. Spencer, 4 McLean (U. S.) 168, Fed. Cas. No. 6665; Peacey v. Peacey, 27 Ala. 683; Hogan v. Calvert, 21 Ala. 194; Faust v. Burgevin, 25 Ark. 170; Lathrop v. Atwood, 21 Conn. 117; Williams v. Boyd, 75 Ind. 286; Lee v. Davis, 70 Ind. 464; Devol v. McIntosh, 23 Ind. 529; Mullendore v. Scott, 45 Ind. 113; Weddle v. Stone, 12 Ind. 625; Tate v. Booe, 9 Ind. 13; Gage v. Lewis, 68 Ill. 604; Gillen v. Peters, 39 Kans. 489, 18 Pac. 613; Griffith v. Buck, 13 Md. 102; Dorsey v. Dashiell, 1 Md. 198; Alexander v. McPeck, 189 Mass. 34, 74 N. E. 88; Farnsworth v. Boardman, 131 Mass. 115; Graham v. Thornton (Miss.), 9 So. 292; Rowsey v. Lynch, 61 Mo. 560; Ham v. Hill, 29 Mo. 275; Wright v. Whiting, 40 Barb. (N. Y.) 235; Kohler v. Matlage, 72 N. Y. 259 (affg. 10 Jones & S. 247); Sinsheimer v. Tobias, 21 Jones & S. (N. Y.) 508; Miller v. Bailey, 19 Ore. 539, 25 Pac. 27; First Nat. Bank v. Eichelberger, 1 Woodw. Dec. (Pa.) 397; Jewell v. Ketchum, 63 Wis. 628, 23 N. W. 709; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Mann v. Ætna Ins. Co., 40 Wis. 549.

against paying firm debts.[28] In order to recover upon a contract of indemnity, the retiring partner must have been compelled to pay firm debts or have suffered other legal harm,[29] in distinction from the rule that a contract to pay firm debts is broken upon nonpayment and a right of action then attaches.[30] A contract of indemnity does not affect a retiring partner's liability to firm creditors.[31]

[28] Taliaferro v. Brown, 11 Ala. 702; Griffin v. Orman, 9 Fla. 22; Gage v. Lewis, 68 Ill. 604; Bunton v. Dunn, 54 Maine 152; Jepson v. Hall, 24 Maine 422; Perry v. Spencer, 23 Mich. 89; Lothrop v. Blake, 3 Pa. St. 483; Hodges v. Strong, 10 Vt. 247; Aubin v. Holt, 2 Kay & J. 66, 25 L. J. Ch. 36, 4 W. R. 112; Wood v. Dodgson, 2 Rose 47; Kennedy v. Cassillis, 2 Swanst. 313, 36 Eng. Reprint 635; Musson v. May, 3 Ves. & B. 194, 35 Eng. Reprint 452.

[29] Lothrop v. Blake, 3 Pa. St. 483; Sutherland v. Webster, 21 Ont. App. 228; Gray v. McMillan, 22 U. C. Q. B. 456 (distinguishing Mewburn v. Mackelcan, 19 Ont. App. 729; Leith v. Freeland, 24 U. C. Q. B. 132).

[30] See ante note 27. Hood v. Spencer, 4 McLean (U. S.) 168, Fed. Cas. No. 6665; Brewer v. Worthington, 10 Allen (Mass.) 329; Hough v. Perkins, 2 How. (Miss.) 724; Rowsey v. Lynch, 61 Mo. 560; Ham v. Hill, 29 Mo. 275; Coleman v. Lansing, 65 Barb. (N. Y.) 54, 1 Thomp. & C. 8; Wright v. Whiting, 40 Barb. (N. Y.) 235; Wilson v. Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477; Lothrop v. Blake, 3 Pa. St. 483; Fay v. Finley, 14 Phila. (Pa.) 206; Gray v. Williams, 9 Humph. (Tenn.) 503; Pope v. Hays, 19 Tex. 375; Smith v. Teer, 21 U. C. Q. B. 412.

[31] Smith v. Ledyard, 49 Ala. 279; Edmondson v. Barrell, Fed. Cas. No. 4284, 2 Cranch C. C. 228; Drake v. Hays, 27 La. Ann. 256; Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88 (applying Rev. Laws, ch. 90, § 4); Tay v. Ladd, 15 Gray (Mass.) 296, 77 Am. Dec. 364; La Montagne v. Bank of New York Nat. Banking Assn., 183 N. Y. 173, 76 N. E. 33; Fagely v. Bellas, 17 Pa. St. 67; Ash v. Werner, 12 Pa. Super. Ct. 39; Meyberg v. Steagall, 51 Tex. 351.

CHAPTER XIX

DISSOLUTION OF PARTNERSHIP

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§ 570. **In general.**—A partnership is presumed to continue until its dissolution is proved.[1] The subject of dissolution is an extensive and important one. Any competent persons may enter into a partnership in a moment's time, if they so desire, but it is often extremely difficult to dissolve the partnership, at least in such a manner as to be fair to all parties thereto and to third parties, and so as to avoid after effects of a disastrous nature. The question of what may constitute a dissolution of a partnership is treated under a somewhat different classification by different authors, and there is a still larger discrepancy among the various jurisdictions and courts, as the question is largely governed by statute in some jurisdictions. The various causes of dissolution are often grouped in several divisions, as dissolution by act of the parties, by judicial decree, and by operation of law, but inasmuch as such a classification is somewhat unsatisfactory, owing to the overlapping in certain cases from one division into another, each cause of dissolution will be treated separate and distinct from such a general classification, though the classification of the Uniform Partnership Act will be followed so far as practicable. Half the space occupied by the provisions of the Uniform Partnership Act is devoted to the subject of dissolution, stating the causes of dissolution and various rules as to the application of assets, the winding up of the business and the powers of partners.

§ 571. **Nature and grounds—Uniform Partnership Act.**—The framers of the Uniform Partnership Act, recognizing that after dissolution the partners still have liabilities as such, connected with winding up the business, did not treat dissolution as the termination of the relation, as some authors have called it. This act provides as to the nature and causes for dissolution: Sec. 29. "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be

[1] Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Bowles v. Biffles (Okla.), 151 Pac. 193; Alaska Banking & Safe Deposit Co. v. Simmons, 122 Pac. 319, 67 Wash. 673.

associated in the carrying on as distinguished from the winding up of the business. Sec. 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. Sec. 31. Dissolution is caused: (1) Without violation of the agreement between the partners. (a) By the termination of the definite term or particular undertaking specified in the agreement. (b) By the express will of any partner when no definite term or particular undertaking is specified. (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking. (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners; (2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provisions of this section, by the express will of any partner at any time; (3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership; (4) By the death of any partner; (5) By the bankruptcy of any partner or the partnership; (6) By decree of court under section 32. Sec. 32. (Dissolution by Decree of Court.) (1) On application by or for a partner the court shall decree a dissolution whenever: (a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind, (b) a partner becomes in any other way incapable of performing his part of the partnership contract, (c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business, (d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, (e) the business of the partnership can only be carried on at a loss, (f) other circumstances render a dissolution equitable. (2) On the application of the purchaser of a partner's interest under sections

28 [referring to the issuance of a charging order against a partner's interest] or 29: (a) After the termination of the specified term or particular undertaking, (b) at any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued." An attempt will be made here so far as practicable, to discuss the causes of dissolution of partnership in the order followed in the Uniform Partnership Act.

§ 572. Expiration of term.—Dissolution of a partnership by act of the partners in accord with their agreement is worked ipso facto by the expiration of the limited period for which the partnership was formed.[2] So, also, the accomplishment of the particular transaction or venture to which the partnership was devoted terminates the relation.[3] The Uniform Partnership Act merely declares the general rule in this respect as to dissolution.[4]

§ 573. Express will of one partner in partnership for indefinite term.—If the length of life of a partnership has not been definitely fixed, the firm exists, in general, at will and may be dissolved whenever any one of its members bona fide[5] so

[2] Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237; Phillips v. Reeder, 18 N. J. Eq. 95; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Peyser v. Myers, 63 Hun 634, 18 N. Y. S. 736, 45 N. Y. St. 413 (affd. 135 N. Y. 599, 32 N. E. 699); Hoffman v. Hauptner, 135 App. Div. 148, 119 N. Y. S. 1022; Masters v. Brooks, 132 App. Div. (N. Y.) 874, 117 N. Y. S. 585; Schlater v. Winpenny, 75 Pa. St. 321; Isler v. Baker, 6 Humph. (Tenn.) 85; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535. See § 224 on duration of relation.

[3] Bank of Montreal v. Page, 98 Ill. 109; Spurck v. Leonard, 9 Ill. App. 174; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Phillips v. Reeder, 18 N. J. Eq. 95; McAuley v. Palmer, 53 Hun (N. Y.) 635, 25 N. Y. St. 969, 6 N. Y. S. 402, 3 Silvernail 245 (affd. 125 N. Y. 742, 26 N. E. 912, 4 Silvernail Ct. App. 339); Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; Jones v. Jones, 18 Ohio C. C. 260, 10 Ohio C. D. 71; Sims v. Smith, 11 Rich. L. (S. Car.) 565. And compare Petrikin v. Collier, 1 Pa. St. 247.

[4] Uniform Partnership Act, § 31 (1, a).

[5] "The Supreme Court of Arkansas. in Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376, said this: 'As a general principle, contracts subsisting during pleasure, are naturally and

chooses.[6] "It is universally conceded that a contract of partnership containing no stipulation as to the time during which it shall continue in force does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, [and] may be dissolved by either partner at his own

necessarily dissolvable by the mere exercise of the will of either of the parties; and this is the principle according to the civil law under ordinary circumstances. * * * In cases of equity, we think the true rule to be this, that to enable one partner to dissolve at will the partnership, two things must occur; first, the renunciation of the partnership must be in good faith, and secondly, it must not be made at an unreasonable time. This is the doctrine of the civil law.' The rule laid down in the second paragraph of the foregoing excerpt was not the rule of the common law (see 30 Cyc. Law & Proc., p. 650; Meysenburg v. Littlefield, 135 Fed. 184; Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Carlton v. Cummins, 51 Ind. 478; Koenig v. Adams, 37 Kans. 52, 14 Pac. 439), and is not the rule in this state, either at law or in equity, unless it is made so by § 5475, Rev. Codes." Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959. See also Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

[6] Champlin, J., delivering the opinion of the court in Walker v. Whipple, 58 Mich. 476, 25 N. W. 472, says: "In this case it is conceded that the copartnership entered into was not limited by the express agreement of the parties. It was therefore determinable, in the absence of fraud, at the will of either party. I do not agree that a limitation may be ingrafted upon such a copartnership agreement by implication arising out of the business engaged in, or the circumstances of the case. It may be said that it is generally understood that such contract relations are not formed except with a view of engaging in some business which may require both time and capital to carry out the object for which the partnership was formed. It is nevertheless true that unless the term for which the partnership is to continue is limited or fixed by the agreement, either party may, at his pleasure, dissolve the relation. This is elementary law. The defendant exercised his right, and the partnership was dissolved by his refusing to continue the business further in company with complainant. It does not concern us what his reasons or notions for doing so were." See also Gleeson v. Costello (Ariz.), 138 Pac. 544; First International Bank of Portal v. Brown (Minn.), 153 N. W. 522; Mulvey v. Anderson, 187 Mo. App. 430, 173 S. W. 738; Featherstonhaugh v. Fenwick, 17 Ves. 298, 11 R. R. 77; Peacock v. Peacock, 16 Ves. 49, 10 R. R. 138; Crawshay v. Maule, 1 Swanst. 495-508, 1 Wils. 181; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Lawrence v. Robinson, 4 Colo. 567; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Null v. Parsons, 145 Ill. App. 436; Carlton v. Cummins, 51 Ind. 478; Koenig v.

will at any time."[7] As was said by the court in[8] an action brought in equity to settle the affairs of a partnership formed by oral agreement for an indefinite time: "A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partnership if he acts without any fraudulent purpose." The code of Louisiana makes specific provision for this contingency as follows:[9] "If the partnership has been contracted without any limitation of time one of the partners may dissolve the partnership by notifying his partners that he does not intend to remain any longer in the partnership, provided, nevertheless, the renunciation to the partnership be made bona fide, and it does not take place unseasonably." The desire of a partner to terminate a partnership agreement, the term of which has not been fixed, may be indicated by his merely giving notice to the other partner or partners.[10] Likewise the intention of a partner

Adams, 37 Kans. 52, 14 Pac. 439; Blaker v. Sands, 29 Kans. 551; Fletcher v. Reed, 131 Mass. 312; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; Whitman v. Robinson, 21 Md. 30; Fletcher v. Reed, 131 Mass. 312; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Berry v. Folkes, 60 Miss. 576; Gaty v. Tyler, 33 Mo. App. 494; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959; Dobbins v. Tatem (N. J. Eq.) 25 Atl. 544; Wood v. Warner, 15 N. J. Eq. 81; Pine v. Ormsbee, 2 Abb. Pr. (N. S.) (N. Y.) 375; Briggs v. Weidmann Cooperage Co., 3 N. Y. S. 813, 24 N. Y. St. 300 (affd. 125 N. Y. 704, 26 N. E. 752); Loorya v. Kupperman, 25 Misc. 518, 54 N. Y. S. 1005; McElvey v. Lewis, 76 N. Y. 373; Smith v. Ervin, 168 Pa. St. 271, 31 Atl. 1067; Yoos v. Doyle, 4 Lack. Leg. N. (Pa.) 128; Heck v. McEwen, 12 Lea (Tenn.) 97; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253; Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769; McMahon v. McClernan, 10 W. Va. 419. And compare Beaver v. Lewis, 14 Ark. 138.

[7] Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135.

[8] Fletcher v. Reed, 131 Mass. 312 (1881).

[9] Code La., art. 2884.

[10] "The dissolution of a partnership at will may be implied from circumstances; but, when not the result of mutual agreement there must be notice by the party desiring a dissolution, to his copartner, of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party, which signify the exercise of the will of the firm that the partnership be dissolved." Spears v. Willis, 151 N. Y. 443, 45 N. E. 849. Quoted in Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A.

to accomplish a dissolution of the firm may, it seems, be effected by conduct such as removing the personal effects of his associates during the latter's absence from the building in which the partnership business is conducted, and refusing to permit him to longer engage in the partnership business.[11] So, also, it has been held that where no definite provision was made as to the time during which the partnership was to continue, and no formal notice of an intention to dissolve was given prior to the bringing of suit, the partnership will be treated as being strictly at will and as dissolved from the date of filing the bill.[12] Where a partner at will repudiates and denies the partnership, it is dissolved from that time.[13] Further a partner who has dissolved the firm is not ordinarily liable in damages for loss resulting to his copartners from his conduct, at least when he has acted in good faith and without fraud.[14]

§ 574. Express will of all partners.—Of course, the fact that the partnership was or was not originally formed to continue for a definite period will not prevent the members of the firm from agreeing, at any time, to dissolve the relation which they then maintain.[15] Any contract, as between the parties thereto,

(N. S.) 959. See further Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Boyd v. Tabb, 7 Ky. L. (abstract) 225; Avery v. Craig, 173 Mass. 110, 53 N. E. 153; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Baldwin v. Walser, 41 Mo. App. 243; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Abbot v. Johnson, 32 N. H. 9; Skinner v. Tinker, 34 Barb. (N. Y.) 333; Eagle v. Bucher, 6 Ohio St. 295, 67 Am. Dec. 342; Yoos v. Doyle, 4 Lack. Leg. N. (Pa.) 128. And compare Wilson v. Davis, 1 Mont. 183.

[11] Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959.

[12] Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840.

[13] Gleeson v. Costello (Ariz.), 138 Pac. 544.

[14] Fletcher v. Reed, 131 Mass. 312; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Baldwin v. Walser, 41 Mo. App. 243; Gaty v. Tyler, 33 Mo. App. 494; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959.

[15] Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237; Lichenstein v. Murphree, 9 Ala. App. 108, 62 So. 444; Black v. Hunter (Cal.), 147 Pac. 463; Phelps v. State, 109 Ga. 115, 34 S. E. 210; Richardson v. Gregory, 126 Ill. 166,

may be terminated at any time by all the parties thereto, and contracts of partnership are not unlike other contracts in this respect.[16] This intent to dissolve need not ordinarily be expressed in words but may be implied, as for instance by discontinuance or abandonment of the partnership business,[17] or by sale of the whole of the partnership property and business.[18] By the Uniform Partnership Act it seems that partners who have assigned their interest or whose interest has been charged are not necessary parties to an agreement among partners for a dissolution.[19] While the partnership agreement as between the partners may be dissolved at any time by the consent of all, and while it may be under certain formalities dissolved as to third persons, it must be understood that a dissolution by agreement of the partners can not injuriously affect third parties without their consent, that is, as to the liability of the members or of the partnership property for existing debts, or obligations, nor as to future obligations incurred by one or more of the partners where the third parties are entitled to notice of the dissolution, and have no formal notice or actual knowledge as to such dissolution. It has

18 N. E. 777; Ligare v. Peacock, 109 Ill. 94; Bank of Montreal v. Page, 98 Ill. 109; Kelley v. Hanes, 143 Ill. App. 1; Wantling v. Howarth, 65 Ill. App. 598; Wood v. Fox's Heirs, 1 A. K. Marsh. (Ky.) 451; Mitchell v. Murphy, 131 La. 1040, 60 So. 677; Simpson v. Ritchie, 110 Maine 299, 86 Atl. 124; Wood v. Gault, 2 Md. Ch. 433; Dille v. Parker, 204 Mass. 163, 90 N. E. 520; Ferguson v. Baker, 116 N. Y. 257; Bushby v. Berkeley, 135 App. Div. 443, 119 N. Y. S. 739; Frear v. Lewis, 151 N. Y. S. 486; Gould v. Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; Dupuy v. Dawson (Tex. Civ. App.), 147 S. W. 698. And compare Stevenson v. Shields, 7 La. 433; Truesdell v. Baker, 2 Rich. L. (S. Car.) 351.

[16] Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; Bragg v. Geddes, 93 Ill. 39; Hazell v. Clark, 89 Mo. App. 78.

[17] Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777 (affg. 27 Ill. App. 621); Spurck v. Leonard, 9 Ill. App. 174; Ligare v. Peacock, 109 Ill. 94; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Dobbins v. Tatem (N. J.), 25 Atl. 544; Ferguson v. Baker, 116 N. Y. 257; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253. And compare Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39; First Nat. Bank of Shakopee v. Strait, 75 Minn. 396, 78 N. W. 101.

[18] Coggswell &c. Co. v. Coggswell (N. J.), 40 Atl. 213; In re Welles, 191 Pa. St. 239, 43 Atl. 207.

[19] Uniform Partnership Act, § 31 (1, c).

been seen that a partnership may be terminated by agreement of all the partners, or by one or more of them, less than all. It is also true that the relation may be terminated by the conduct of the partners without any express agreement therefor, by a sort of estoppel.[20] In one case[21] where both parties agreed, and the evidence showed, that to all outward appearances, and in their relations to third persons, there was on a certain day, a dissolution of the partnership, and a transfer of the property purchased to one partner, Carter, J., in his opinion said: "We are of the opinion that such apparent termination of the partnership relations of the parties should be treated as an actual dissolution among themselves, unless it is made to appear by a preponderance of the evidence that, as alleged by Wright (one of the partners), he and Cudahy (the other partner) continued to be partners secretly throughout the deal." The acts were not, perhaps, conclusive as to the dissolution, but were at least presumptive thereof, and estopped the parties from denying the fact of dissolution, unless they could, by clear evidence, establish the fact that there was in fact no dissolution.

§ 575. **By expulsion of partner.**—There is no power on the part of some members of a partnership to expel a member unless it is expressly given in the partnership agreement and such power must be exercised in good faith and strictly in accordance with the power as granted.[21a] The power must be exercised by

[20] Paton v. Wright, 15 How. Pr. (N. Y.) 481; Armstrong v. Fahnestock, 19 Md. 58; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253.

[21] Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39.

[21a] See Lindley Partnership (8th ed.), pp. 490-493, and following cases: Russell v. Russell, 49 L. J. Ch. 268, 14 Ch. Div. 471, 42 L. T. 112; Steuart v. Gladstone, 10 Ch. Div. 626, 40 L. T. 145, 27 W. R. 512; Blisset v. Daniel, 10 Hare 493; Andrews v. Mitchell [1905], A. C. 78: Fisher v. Jackson, 60 L. J. Ch. 482 [1891], 2 Ch. 84, 64 L. T. 782; Smith v. Mules, 9 Hare 556, 21 L. J. Ch. 803, 16 Jur. 261; Hart v. Clark, 6 De G., M. & G. 232, 24 L. J. Ch. 137, 3 Eq. R. 264, 3 W. R. 147; Clarke v. Hart, 6 H. L. Cas. 633; Carmichael v. Evans [1904], 1 Ch. 486. See also Patterson v. Silliman, 28 Pa. St. 304; Piatt v. Oliver, 3 McLean (U. S.) 27, Fed. Cas. No. 11116 (affd. 3 How. 333, 11 L. ed. 622); Kimball v. Gearhart, 12 Cal. 27; Gorman v. Russell, 14 Cal. 531.

all whose concurrence is required,[22] and can not be exercised for omission of duty unless the omission was intentional,[23] but a partner has no right to an opportunity to explain his conduct, unless to the other partners, if they are to decide whether expulsion is justifiable.[24] Mr. Lindley says: "If a partner has been in fact wrongfully expelled and damnified it is not easy to see why an action for damages should not lie."[25] Under the definition of dissolution given in the Uniform Partnership Act, rightful expulsion of a partner would ipso facto dissolve the firm, since he ceases to be associated in carrying on the business.[26] The American cases on the subject of expulsion are very few, as will be seen from those cited.

§ 576. By express will of one partner in contravention of agreement.—The Uniform Partnership Act in permitting dissolution by express will of one partner in contravention of agreement at any time has followed what is probably the better rule and that supported by the weight of authority in this country.[27] But the holdings are far from being in conformity on this question. The principle that one partner may terminate at will a partnership agreement when no time was fixed for its termination has not always been applied, when the firm has come into being, unattended by any prescribed limit as to the length of its existence, for the accomplishment of a particular object; in such case, there are many holdings that dissolution prior to the achievement of the purpose of the partnership should only be for cause.[28] Where a partnership has been formed to

[22] Smith v. Mules, 9 Hare 556, 21 L. J. Ch. 803, 16 Jur. 261; Steuart v. Gladstone, 10 Ch. Div. 626, 40 L. T. 145, 27 W. R. 512.

[23] Smith v. Mules, 9 Hare 556, 21 L. J. Ch. 803, 16 Jur. 261.

[24] Green v. Howell (1910), 1 Ch. 495; Wood v. Woad, L. R. 9 Ex. 190; Cooper v. Wandsworth Board of Works, 14 C. B. (N. S.) 180; Clark v. Leach, 32 Beav. 14.

[25] Lindley Partnership (8 ed.), p. 493, citing Catchpole v. Ambergate &c. R. Co., 1 El. & Bl. 111, and judgment of Cleasby and Pollock B. B. in Wood v. Woad, L. R. 9 Ex. 190.

[26] Uniform Partnership Act, §§ 29, 31 (1, d).

[27] Uniform Partnership Act, § 31 (2).

[28] Beaver v. Lewis, 14 Ark. 138; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Hubbell v.

continue for a definite period, the right of a partner to dissolve at will is an open question. Some cases hold that every partner has an indefeasible right to dissolve the partnership,[29] and it is held that the voluntary assignment of one partner's interest works such dissolution, though the term has not expired.[30] But there are many cases denying the right to dissolve a partnership agreement before expiration of its term.[31] Even if a partner has

Buhler, 43 Hun 82, 6 N. Y. St. 578; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676. And compare Cole v. Moxley, 12 W. Va. 730.

[29] That the dissolution of such a partnership may be accomplished at will, see Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336, in which Cooley, C. J., delivering the opinion of the court says: "The rule on this subject is thus stated in an early New York case. The right of a partner to dissolve, it is said, 'is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where the partners covenant with each other that the partnership shall continue several years, either partner may dissolve it the next day by proclaiming his determination for this purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his contract. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it.' Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286." See also Blake v. Dorgan, 1 G. Greene (Iowa) 537; Karrich v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Swift v. Ward, 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302; Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Mason v. Connell, 1 Whart. (Pa.) 381; Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756; In re Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Kinloch v. Hamlin, 2 Hill Eq. (S. Car.) 19, 27 Am. Dec. 441; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253.

[30] Monroe v. Hamilton, 60 Ala. 226; Miller v. Brigham, 50 Cal. 615; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Conrad v. Buck, 21 W. Va. 396; Westbrook v. Wheeler, 25 Ont. 559.

[31] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Pearpoint v. Graham, 4 Wash. (U. S.) 232, Fed. Cas. No. 10877; Ross v. Cornell, 97 Ga. 340, 22 S. E. 394; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Cash v. Earnshaw, 66 Ill. 402; Berry v. Folkes, 60 Miss. 576; Hartman v. Woehr, 18 N. J. Eq. 383; Van Kuren v. Trenton &c. Mfg. Co., 13 N. J. Eq. 306; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33; Smith v. Mulock, 24 N.

such right he may nevertheless by his exercise thereof without cause, render himself liable in damages to his copartners.[32] "Some courts have held that a partner can not terminate such a partnership [one formed for a specific purpose or for a specified time] at will; but the trend of the authorities now is that it may be done, but, if it is done without legal cause, it will subject the wrongdoer to liability for resulting damages."[33] "There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious. * * * When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases."[34] Where a partnership agreement provides that it shall be terminated "by mutual arrangement only," it is held in England that a partnership is created for the joint lives of the partners and it can not be terminated by act of one partner.[35] But in Texas a similar agreement has been construed as making the partnership determinable at will.[36]

Y. Super. Ct. 569, 1 Abb. Pr. (N. S.) 374; Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534; Von Tagen v. Roberts, 2 Pearson (Pa.) 137; Hannaman v. Karrick, 9 Utah 236, 33 Pac. 1039 (affd. 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135); Cole v. Moxley, 12 W. Va. 730; Henn v. Walsh, 2 Edw. Ch. 129.

[32] Uniform Partnership Act, § 38, 2 (a) II; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756; Hagenaers v. Herbst, 30 App. Div. 546, 52 N. Y. S. 360 (affd. 164 N. Y. 603, 58 N. E. 1088); Westwood v. Cole, 120 N. Y. S. 884; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Cockley v. Brucker, 54 Ohio St. 214, 44 N. E. 590; Addams v. Tutton, 39 Pa. St. 447; Mason v. Connell, 1 Whart. (Pa.) 381; Cole v. Moxley, 12 W. Va. 730. And compare Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534.

[33] Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029.

[34] Cooley, C. J., in Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336.

[35] Moss v. Elphick [1910], 1 K. B. 846, 19 Ann. Cas. 382.

[36] Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234.

§ 577. By event making partnership unlawful—War.—Again, the law may operate to dissolve a partnership when an event happens which renders business of the firm unlawful.[87] It is a well grounded principle that no partnership can exist for the accomplishment of an illegal purpose. If on the one hand the purpose for which the parties joined their efforts was illegal, it can be plainly seen that no partnership is formed, although the liabilities of actual partners may devolve upon those persons attempting to form a partnership, as to certain third parties. On the other hand, assuming the business of the partnership to have been legal when the partnership was formed and the business commenced, and later to become illegal, what effect would this have upon the firm? It is very generally, if not universally established, that under such circumstances the firm would be immediately dissolved by the operation of the law making the business illegal. Mr. Lindley, in his work on Partnership, says: "Upon principle it is apprehended that if, by any change in the law, it becomes illegal to carry on a business, every partnership formed before making the law for the purpose of carrying on that business, must be taken to have been dissolved by the law in question. So if, the law remaining unchanged, some event happens which renders it illegal for the members of a firm to continue to carry on their business in partnership, such event dissolves the firm."[88] For example, until recent legislation changed the law, a sale of land in California to Japanese was legal, and a partnership, entered into and conducted exclusively for the purpose of selling land to Japanese was legal. Upon the passing of the recent statute by California, refusing the right to Japanese to purchase land, such a partnership would dissolve, providing, of course, that its objects were all for objects made illegal by the statute. To the same effect would have been the rule when a partnership was organized before the Chinese exclusion act was passed, for the sole aim and purpose of bringing

[87] Esposito v. Bowden, 7 El. & Bl. 763, 27 L. J. Q. B. 17, 3 Jur. (N. S.) 1209, 5 W. R. 732; Griswold v. Waddington, 16 Johns. (N. Y.) 438.

[88] Lindley Partnership, p. 584.

Chinese into this country, or a partnership for the purpose of assisting runaway slaves, before such act was prohibited by law. As to the second ground given by Lindley, where the business itself is not illegal, but where the association of the partners becomes illegal, and the firm is dissolved, no better illustration can perhaps be used than a proclamation of war declared between two nations, citizens of which nations are in partnership. There has been considerable doubt expressed, however, as to whether such a condition of war absolutely dissolves the firm, or whether the partnership is simply suspended during the term of the existence of the state of war. Mr. Chief Justice Spencer said,[89] in referring to war as dissolving partnerships as set forth above, that: "When the objects and intentions of an union of two or more individuals to prosecute commercial business are considered; when it is seen that an event has taken place without their fault, and beyond their control, which renders their respective nations, and, along with them, the defendants themselves, enemies of each other; that all communication and intercourse have become unlawful; that they can no longer co-operate in the conduct of their common business by affording each other advice, and are kept hoodwinked as to the conduct of each other; that the trade itself in which they were engaged has ceased to exist; that if they enter into any contracts, they are incapable of enforcing their performance by an appeal to the courts; that their allegiance leads them to support opposite and conflicting interests—I am compelled to say that the law can not be so unjust as to pronounce that a partnership so circumstanced, when all its objects and ends are prostrated, shall continue; and, with the clearest conviction in my mind, and in analogy to the cases to which reference has been made, I have come to the conclusion that the partnership between the defendants *was at least suspended,* and I incline to the opinion that *it was ipso facto dissolved by the war,* and consequently that the defendant, J. W., is

[89] Griswold v. Waddington, 15 Johns. 57 (affd. 16 Johns. (N. Y.) 438).

not liable to this action." In one case[40] it was held that the war of 1860 dissolved a copartnership existing between infants in Illinois and a person in Mississippi; but the dissolution had no regard to things past. The parties continued partners as to property actually acquired, and remained bound to account to each other therefor. In all such cases, the partnership is dissolved by operation of law, except in such jurisdictions as hold that the relation is simply suspended, in which case the suspension also occurs by operation of law.[41] The general rule is that if a war breaks out which renders the members of the partnership alien enemies, it operates as a dissolution of the firm.[42] The provision of the Uniform Partnership Act, which is merely declaratory of the general law, is that a partnership is dissolved by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.[43] The foregoing examples have fallen under the first alternative of this provision. The second applies where a partner becomes disqualified to continue in the business, or as a partner. Thus, in Indiana, it is declared that the election and qualification of a member of a law firm as judge dissolves the partnership,[44] and at common law, marriage of a woman partner made her incompetent to contract and dissolved the firm.[45]

§ 578. **Marriage of a woman partner.**—The subject of the competency of a married woman as a party to a contract of

[40] Douglas Case, 14 Ct. of Cl. 1.

[41] See § 186, on aliens as partners.

[42] McAdams v. Hawes, 9 Bush (Ky.) 15; New York Life Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290; Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Seaman v. Waddington, 16 Johns. (N. Y.) 510; Griswold v. Waddington, 15 Johns. 57 (affd. 16 Johns. (N. Y.) 438); Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; Bank of New Orleans v. Matthews, 49 N. Y. 12; Booker v. Kirkpatrick, 26 Grat. (Va.) 145; Taylor v. Hutchison, 25 Grat. (Va.) 536, 18 Am. Rep. 699. See note, Dorsey v. Kyle, 96 Am. Dec. 629.

[43] Uniform Partnership Act, § 31 (3).

[44] Felt v. Mitchell, 44 Ind. App. 96, 88 N. E. 723; Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. 405.

[45] See post § 578.

partnership was previously discussed.[46] Additional discussion from the viewpoint of dissolution because of the marriage of a woman partner will follow here. Under the common law, the marriage of a woman partner worked a dissolution of the firm of which she was a member,[47] and it was held that the marriage of a man and woman who are partners will dissolve the partnership relation.[48] Only in certain excepted cases could a married woman, at common law, enter into a contract of partnership with any person. The rule has been very generally changed by statute in this country at the present time. In Ohio, for instance, the statute is as follows: "A husband or wife may enter into any engagement or transaction with each other or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."[49] The emancipation of woman as to property rights, and the gradual growth thereof is well shown in the law of Ohio. The law in that state originally followed the common-law rule, of (with certain minor exceptions) no right to contract. In 1884 it was provided by legislative enactment that: "The separate property of the wife shall be under her sole control and shall not be taken by any process of law for the debts of the husband, or be in any manner conveyed or incumbered by him, and she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."[50] Prior to this, in 1861, a statute had been passed, making the real and personal property of a married woman her separate estate. In one case[51] the court said: "That a married woman

[46] See §§ 190, 191, on Married Women; and Husband and Wife as competent parties.

[47] Little v. Grayson, 30 Pittsb. Leg. Jour. (Pa.) 222; Little v. Hazlett, 197 Pa. St. 591, 47 Atl. 855; Brown v. Chancellor, 61 Tex. 437. And compare Nerot v. Burnand, 4 Russ. 247; Alexander v. Morgan, 31 Ohio St. 546.

[48] Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217. And compare Burney v. Savannah Grocery Co., 98 Ga. 711, 25 S. E. 915, 58 Am. St. 342.

[49] Ohio Code, § 7999.

[50] Ohio Rev. Stat. 1884, § 3100.

[51] Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654.

had not capacity at common law to enter into a partnership with her husband will not admit of serious controversy.[52] If she be endowed with capacity to enter into a contract of copartnership with her husband in Ohio it is so by virtue of some enabling statute. * * * As the transactions involved in this controversy occurred prior to the legislation of 1884 (81 Ohio L. 65, 209), we are not called upon to consider or construe these enactments." It is seen by the above decision that at least until the statute of 1884, the law was well recognized in Ohio that a wife could not enter into a partnership with her husband, although another case[53] recognizes the principle, under the act of 1861, that the wife could join in a partnership with persons other than her husband, as to her separate estate or property, but no further. The question as to whether or not the act of 1884 gave to the wife the capacity to enter into a partnership with her husband, was carefully and expressly evaded by the Supreme Court in the case[54] cited above, and the point has not since been expressly decided in any reported Ohio case, insofar as the author has been able to ascertain. However, in his opinion, the act of 1884 did give the wife this right, and the right is even more thoroughly established in the present law cited above. In several jurisdictions it has been expressly held that a wife may be partner with her husband.[55] Does, then, the marriage of a woman dissolve a partnership of which she is a member? The answer is that it must depend entirely upon the rule in the particular jurisdiction, there being three classifications thereof. In the first, where the old common-law rule prevails, such a marriage to any one would dissolve the partnership. In

[52] Citing 1 Bl. Com. 442; Mathews Partnership, § 9; 1 Collyer Partnership (6th ed.), § 14; Parsons Partnership, p. 23; Brown v. Jewett, 18 N. H. 230.

[53] Swasey v. Antram, 24 Ohio St. 87.

[54] Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654.

[55] Scatt v. Conway, 58 N. Y. 619; Zimmerman v. Erhard, 83 N. Y. 74; Graff v. Kinney, 15 Abb. N. Cas. 397, 37 Hun (N. Y.) 405, 1 How. Pr. (N. S.) 59; Krouskop v. Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817; Todd v. Lee, 15 Wis. 365.

the second, where a wife can, in general, enter into such a partnership, excepting with her husband, a marriage by the woman partner with one of her copartners would dissolve the firm. In the third, where a woman may enter into a contract with any one, her marriage to a member of the firm would not work a dissolution.[56]

§ 579. By death of a partner.—The death of one of the partners ordinarily terminates the partnership as to all the members thereof.[57] Death of a special partner, like that of a general partner, dissolves a partnership.[58] The reasons for such dissolu-

[56] See generally §§ 190, 191.

[57] Pigott v. Bagley, M'Clel. & Y. 569, 19 Eng. Rul. Cas. 509n; Burwell v. Mandeville, 2 How. (U. S.) 560, 11 L. ed. 378; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; Ruggles v. Buckley, 175 Fed. 57, 27 L. R. A. (N. S.) 541, 99 C. C. A. 73; Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384; Lee v. Wimberly, 102 Ala. 539, 15 So. 444; Espy v. Comer, 76 Ala. 501; Knapp v. McBride, 7 Ala. 19; Humphries v. McCraw, 5 Ark. 61; Louis v. Elfelt, 89 Cal. 547, 26 Pac. 1095; Gleason v. White, 34 Cal. 258; Filley v. Phelps, 18 Conn. 294; Canfield v. Hard, 6 Conn. 180; Mulherin v. Rice, 106 Ga. 810, 32 S. E. 865; Carter v. Lipsey, 70 Ga. 417; Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927 and note (revg. judgment 164 Ill. App. 25); McCall v. Moss, 112 Ill. 493; Remick v. Emig, 42 Ill. 342; Talcott v. Dudley, 4 Scam. (Ill.) 427; Forrester v. Oliver, 1 Bradw. (Ill.) 259 (revd. 96 Ill. 315); Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543; Cobble v. Tomlinson, 50 Ind. 550; Williamson v. Wilson, 1 Bland (Md.) 418; Goodburn v. Stevens, 5 Gill (Md.) 1; Marlett v. Jackman, 3 Allen (Mass.) 287; Jenness v. Carleton, 40 Mich. 343; Roberts v. Kelsey, 38 Mich. 602; Mudd v. Bast, 34 Mo. 465; Costello v. Costello, 209 N. Y. 252, 103 N. E. 148 (affg. judgment 137 N. Y. S. 132, 152 App. Div. 280); Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Potter v. Moses, 1 R. I. 430; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Morris v. Owen (Tex. Civ. App.), 143 S. W. 227; Davis v. Christen, 15 Grat. (Va.) 11.

[58] Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; McKinzie v. United States, 34 Ct. Cl. (U. S.) 278; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Oliver v. Forrester, 96 Ill. 315; Nelson v. Hayner, 66 Ill. 487; Remick v. Emig, 42 Ill. 342; Johnson v. Clark, 18 Kans. 157; Ellis v. Johnson, 4 Ky. L. (abstract) 991; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Price v. Succession of Mathews, 14 La. Ann. 11; Cane v. Battle, 3 La. Ann. 642; Hamlin v. Mansfield, 88 Maine 131, 33 Atl. 788; Knowlton v. Reed, 38 Maine 246; Williamson v. Wilson, 1 Bland (Md.) 418; Goodburn v.

tion are thus stated in a leading case:[59] "One of the essential elements of a contract of copartnership consists in the right which each member has to the continuance of all his associates as members of the firm. If one withdraws, the copartnership is at an end. The delectus personarum lies at the foundation of the agreement of the parties, and is one of the main considerations on which it rests. The personal qualities of each member of a firm enter largely into the inducements which lead parties to form a copartnership; and if the abilities and skill, or the character and credit, of any one are withdrawn, the contract between them is terminated and the copartnership is dissolved. When, therefore, by the death of a member of a firm, his per-

Stevens, 5 Gill (Md.) 1; Walker v. House, 4 Md. Ch. 39; Hall v. Clagett, 48 Md. 223; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Washburn v. Goodman, 17 Pick. (Mass.) 519; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Jenness v. Carleton, 40 Mich. 343; Roberts v. Kelsey, 38 Mich. 602; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Robertshaw v. Hanway, 52 Miss. 713; Mayson's Admr. v. Beazley's Admr., 27 Miss. 106; Exchange Bank v. Tracy, 77 Mo. 594; Edwards v. Thomas, 66 Mo. 468; Mudd v. Bast, 34 Mo. 465; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Gaskill v. Adams, 83 Mo. App. 380; Greenburg v. Early, 4 Misc. 99, 30 Abb. N. Cas. 300, 23 N. Y. S. 1009, 53 N. Y. St. 130; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Dexter v. Dexter, 43 App. Div. 268, 60 N. Y. S. 371; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 21 Am. St. 686, 12 L. R. A. 146; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 5 L. R. A. 410; Sage v. Woodin, 66 N. Y. 578; Egberts v. Wood, 3 Paige Ch. (N. Y.) 517, 24 Am. Dec. 236; Griswold v. Waddington, 15 Johns. (N. Y.) 57 (affd. 16 Johns. (N. Y.) 438); Cheeseman v. Wiggins, 1 Thomp. & C. (N. Y.) 595; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Champion v. Williams, 2 Ohio Dec. 388, 2 Ohio (N. P.) 329; In re Smith's Estate, 11 Phila. (Pa.) 131; Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Darling's Estate, 7 Kulp (Pa.) 323; Potter v. Moses, 1 R. I. 430; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Fisher v. Tucker, 1 McCord Eq. (S. Car.) 169; Tompkins v. Tompkins, 18 S. Car. 1; Carroll v. Alston, 1 S. Car. 7; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Isler v. Baker, 6 Humph. (Tenn.) 85; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Alexander's Exrs. v. Lewis, 47 Tex. 481; McNeish v. United States Hulless Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Tenney v. New England Protective Union, 37 Vt. 64; Davis v. Christian, 15 Grat. (Va.) 11; Vilas v. Farwell, 9 Wis. 460; Crawshay v. Maule, 1 Swanst. 495-520, 1 Wils. 181; Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237.

[59] Marlett v. Jackman, 3 Allen (Mass.) 287.

sonal liability ceases and his estate is by operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow as a necessary consequence, that the power of the surviving copartners to bind each other by new contracts and engagements must at once cease. The copartnership would then be terminated not only as to the deceased partner and his estate, but also as to the other members of the firm. The delectus personarum would no longer exist. The contract of copartnership did not confer any power or authority on the several copartners to bind each other individually, or to act in behalf of any number of them less than the whole. The copartnership constituted the principal; and the several copartners were agents, not of the different persons comprising the firm, but only of all taken together and forming one body united in a community of interest for common objects. If, then, the members of the firm are held to be bound by a contract entered into by one of the copartners in the name of the firm after its dissolution by the death of a member, such liability does not arise or grow out of the agreement of copartnership. On the contrary, it is directly adverse to the nature and spirit of the contract between the parties. No such agency was created by the formation of the copartnership. It presents the anomaly of holding a party responsible for the act of an agent after the principal—the copartnership—had ceased to exist, and all authority to act in its behalf had been revoked by an act of God." Even where a partnership agreement provides for the continuance of the business after the death of any one of the partners,[60] it seems that, strictly speaking, the effect of such

[60] Page v. Ratliffe, 76 L. T. (N. S.) 63; Hunter v. Dowling (1895), 2 Ch. 223, 64 L. J. Ch. 713, 13 R. 474, 72 L. T. 653, 43 W. R. 619; Jennings v. Jennings, 67 L. J. Ch. 190; Ex parte Bevan, 10 Ves. 107; Dowse v. Gorton (1891), A. C. 190, 60 L. J. Ch. 745, 64 L. T. 809, 40 W. R. 17; In re Johnson, L. R. 15 Ch. Div. 548; Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Espey v. Comer, 76 Ala. 501; Houston v. Stanton, 11 Ala. 412; Knapp v. McBride, 7 Ala. 19; Edgar v. Cook, 4 Ala. 588; Blodgett v. American Nat. Bank, 49 Conn. 9; Butler v. American Toy Co., 46 Conn. 136; Duffield v. Brainerd, 45 Conn. 424; Rand v.

agreement upon the happening of the contingency mentioned, will be the formation of a new firm,[61] although the courts of some jurisdictions apparently take the view that it will prevent the dissolution of the partnership.[62] It has been held that if a continuance of the business after death of a partner is stipulated in the partnership agreement, it is binding only at the option of the deceased partner's representatives or heirs.[63] But death of a partner always dissolves an ordinary partnership, unless the articles of partnership provide for a continuance of the firm after

Wright, 141 Ind. 226, 39 N. E. 447; Stanwood v. Owen, 14 Gray (Mass.) 195; Jenness v. Carlton, 40 Mich. 343; Roberts v. Kelsey, 38 Mich. 602; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Edwards v. Thomas, 66 Mo. 468; Scharringhausen v. Luebsen, 52 Mo. 337; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Wilson v. Simpson, 89 N. Y. 619; Delemater v. Hepworth, 48 Hun 618, 2 N. Y. S. 310, 15 N. Y. St. 833; In re Laney, 50 Hun 15, 18 N. Y. St. 463, 2 N. Y. S. 443 (affd. 119 N. Y. 607, 23 N. E. 1143); Jones v. Procter, 5 Ohio Dec. 416, 5 Ohio N. P. 315; Peters v. Campbell, 2 Ohio Dec. (Reprint) 526, 3 West. L. Month. 587; Brew v. Hastings, 196 Pa. St. 222, 46 Atl. 257, 49 Am. St. 706; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080; In re Leaf's Appeal, 105 Pa. St. 505; Roessler's Estate, 5 Pa. Dist. 776; Laughlin v. Lorenz's Admr., 48 Pa. St. 275, 86 Am. Dec. 592; Carter v. Young, 9 Lea (Tenn.) 210; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Morrow v. Morrow, 2 Tenn. Ch. 549; Alexander's Exrs. v. Lewis, 47 Tex. 481; McNeish v. United States Hulless Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Tenney v. New England Protective Union, 37 Vt. 64.

[61] Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Ellis v. Johnson, 4 Ky. L. (abstract) 991; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Brenner v. Hirsche, 69 Miss. 309, 13 So. 730; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080. See also Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927 and note. And compare Lee v. Wimberly, 102 Ala. 539, 15 So. 444.

[62] Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Roberts v. Kelsey, 38 Mich. 602; Edwards v. Thomas, 66 Mo. 468; Farmers' & Traders' Sav. Inst. v. Garesche, 12 Mo. App. 584.

[63] Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B, 927 and note.

such death. In an Indiana case[64] there was a contract between the members of a banking partnership, which contained the following provision: "In case of the death of any one of the partners, his or her heirs or legal representatives shall occupy the same place in the copartnership as was occupied by the partner; and it shall not be competent for such heirs or legal representatives to withdraw such capital until the expiration of the term of partnership." One of the partners, William H. Morrison, died during the continuance of the agreement, the firm later encountering reverses, and the firm passed into a receiver's hands. In adjusting the matters, the court, in its opinion thus touches upon the question under discussion, as follows: "By the death of William H. Morrison in March, 1881, however, there can be little doubt, as we think, that the law would have worked a dissolution of the partnership, were it not for the provision to the contrary in the articles of agreement.[65] By that provision Mary Morrison, widow and administratrix of William H. Morrison, took his place in the company, and the partnership was continued under the board of control until March 1, 1882 (the time of the expiration of the partnership agreement.)" Mining partnerships are an exception in this respect to the ordinary partnership. In a California case[66] the rule as to joint owners of mines is stated as follows: "They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some other rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." Death of a member of a joint stock company does not, ipso facto, work a dissolution.[67]

§ 580. By bankruptcy.—Again, a partnership is dissolved by operation of law when either the firm itself or any one of its

[64] Rand v. Wright, 141 Ind. 226, 39 N. E. 447 (1895).

[65] Citing Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543, and authorities cited.

[66] Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96 (quoted in Congden v. Olds, 18 Mont. 487, 46 Pac. 261). See also Taylor v. Castle, 42 Cal. 367.

[67] Carter v. McClure, 98 Tenn. 109, 38 S. W. 585, 36 L. R. A. 282, 60 Am. St. 842.

members is adjudged insolvent or a bankrupt.[68] In like manner an assignment for the benefit of creditors, ordinarily, it seems, accomplishes a dissolution,[69] or an assignment by one partner of his interest for the benefit of his individual creditors.[70] And the continuation of the business after such adjudication or assignment will not in all probability change the effect of either.[71] The subject of bankruptcy is of such importance in partnership law that it will be treated in a separate chapter,[72] and under the general discussion of the topic will be treated its relation to dissolution.

§ 581. **Levy of attachment or execution sale.**—A levy of execution against one partner on his interest in the firm and the sale of such interest works a dissolution of the firm.[73] But this

[68] Ex parte Ruffin, 6 Ves. 119, 5 R. R. 237; Fox v. Hanbury, Cowp. 449; Amsinck v. Bean, 22 Wall. (U. S.) 395, 22 L. ed. 801; Lacey v. Cowan, 162 Ala. 546, 50 So. 281; McNutt v. King, 59 Ala. 597; Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; Gordon v. Freeman, 11 Ill. 14; Talcott v. Dudley, 4 Scam. (Ill.) 427; Fitch v. Pryse, 4 Ky. L. (abstract) 904; Williamson v. Wilson, 1 Bland (Md.) 418; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Eustis v. Bolles, 146 Mass. 413, 4 Am. St. 327, 16 N. E. 286; Atwood v. Gillett, 2 Doug. (Mich.) 206; Halsey v. Norton, 45 Miss. 703, 7 Am. Rep. 745; Greene v. Breck, 32 Barb. (N. Y.) 73; Welles v. March, 30 N. Y. 344; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Havens v. Hussey, 5 Paige Ch. (N. Y.) 30; Lovins v. Laub, 85 Misc. 336, 147 N. Y. S. 304; Blackwell v. Claywell, 75 N. Car. 213; In re McKelvy's Appeal, 72 Pa. St. 409; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[69] Simmons v. Curtis, 41 Maine 373; Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924; Davis v. Megroz, 55 N. J. L. 427, 26 Atl. 1009; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33; Carrol v. Evans, 27 Tex. 262.

[70] Saloy v. Albrecht, 17 La. Ann. 75; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Marquand v. N. Y. Mfg. Co., 17 Johns. (N. Y.) 525; Ogden v. Arnot, 29 Hun (N. Y.) 146; Conrad v. Buck, 21 W. Va. 396; Cameron v. Stevenson, 12 U. C. C. P. 389. See note 30, ante § 576, on dissolution by express will of one partner in contravention of partnership agreement.

[71] Atwood v. Gillett, 2 Doug. (Mich.) 206. And compare Fitch v. Pryse, 4 Ky. L. 904.

[72] See post ch. 22.

[73] Theriot v. Michel, 28 La. Ann. 107; Sanders v. Young, 31 Miss. 111; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 6; Renton v. Chaplain, 9 N. J. Eq. 62; Carter v. Roland, 53 Tex. 540; Aspinall v. London &c. R. Co., 11 Hare 325, 1 W. R. 518; Habershon v. Blurton, 1 De Gex. & Sm. 121.

rule does not hold if the levy and sale was made by collusion of one partner with his creditor in order to force a dissolution and deprive a copartner of valuable rights.[74] It has been held that where the seizure of the interest of one partner deprives the partnership of control of firm property, the partnership is dissolved.[75] Merely filing an attachment against partnership property,[76] or mere seizure of such property under writ of attachment,[77] will not dissolve the firm.

§ 582. By judicial decree and by operation of law—Generally.—The various ways in which a partnership may be dissolved are often classified under three heads: by operation of law; by act of the partners themselves; and by the decree of a court of competent jurisdiction. The text-writers who follow this classification make dissolution by judicial decree one of the great divisions of the subject of dissolution with several subdivisions. This method has not been fully observed here, owing to the fact that in such a classification numerous subdivisions overlap from one general division. Hence the subject of dissolution by judicial decree will be treated in a very general manner. The same observations apply to dissolution by operation of law, as a general division. Both these methods of dissolution occur by reason of the working of the law. The difference lies mainly in this, that by operation of law the dissolution is automatic, the law works of its own volition or momentum, while by judicial decree the law is set in motion by order of a court. These two methods are, in a way, set off from a third method and often referred to in text-books where the dissolution occurs by reason of the acts of the parties. The difficulty of proceeding according to the above three classifications with subdivisions thereunder, may be better realized when we consider that the partnership itself must be formed by the acts of the parties

[74] Renton v. Chaplain, 9 N. J. Eq. 62.

[75] Borah v. O'Neill, 116 La. 672, 41 So. 29. Contra: Choppin v. Wilson, 27 La. Ann. 444.

[76] Foster v. Hall, 4 Humph. (Tenn.) 346.

[77] Barber v. Barnes, 52 Cal. 650.

themselves, and that in very many instances the dissolution of the firm by act of law or by judicial decree is founded upon some act of the partners or part of them, and further that it is often necessary to resort to judicial decree as to whether or not there has been a dissolution, or acts which should result in dissolution, by either or both of the other two methods. By some authorities it has been held that a partnership at will may be dissolved by act of the parties, while a partnership for a definite term can only be dissolved by judicial decree.[78] Another, and probably more strongly grounded rule is that any partner may at any time terminate the partnership relation, with or without cause, subject always to the provision that should he do so without sufficient grounds, that he shall be liable in damages to the partner or partners injured.[79] This diversity of opinion in the different jurisdictions further illustrates the difficulty of a general classification, as the same identical case might be classified under one division in one state, and otherwise in an adjoining state. The same diversity of opinion exists as between dissolution by operation of law and by judicial decree. As is shown elsewhere herein, abandonment of the partnership agreement, in certain jurisdictions, ipso facto, dissolves a partnership, while in other jurisdictions there must be an order of court to produce the same result. The marriage of a woman partner, in such jurisdictions as have not departed from the common-law rule, is usually given as an example of dissolution by operation of law, and such is undoubtedly the case, yet it is submitted that this is also dissolution by the act of a party, as, in legal contemplation, at least, the woman partner knew the law, and elected to do, voluntarily, an act which she knew would dissolve the firm. This is really, it would seem, dissolution by a combination of an act of a party and operation of law. Moreover, bankruptcy of a partner is usually given as an ex-

[78] Cash v. Earnshaw, 66 Ill. 402; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534; Cole v. Moxley, 12 W. Va. 730.

[79] Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Mason v. Connell, 1 Whart. (Pa.) 381.

ample of dissolution by operation of law. True, the law does say that bankruptcy of a partner dissolves a partnership, yet it takes a judicial decree to create a state of bankruptcy, and, further, in cases of voluntary bankruptcy, the decree is based upon an act of a partner consenting thereto. Therefore, it would appear that dissolution by reason of voluntary bankruptcy arises as follows: 1, by act of a party; 2, by judicial decree; 3, by operation of law, and that all three methods enter into the final dissolution. Analysis of the cases will show that a very large number of dissolved partnerships occur by reason of a combination of two or more of the above general classifications. The general classification is, however, not without merit, and has considerable value when applied to individual cases, as there are many cases which can come squarely within one of these three divisions, and probably all cases come within the three divisions. The difficulty appears where an attempt is made to bring each of the different causes of dissolution entirely within one of the above three divisions. Under the Uniform Partnership Act certain causes are given whereby a partner may on application have a dissolution decreed by a court, and those grounds for dissolution will be considered next, with reference to the existing decisions on the subject, which do not always make a decree of court necessary to work a dissolution on some of those grounds. In general, when a partnership is formed to continue for a specified time and can not be terminated at will without the risk that the dissolving partner will be liable to respond to his associates in damages, resort may be had to a court of equity to decree dissolution.[80]

[80] Northen v. Tatum, 164 Ala. 368, 51 So. 17; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Moran v. McInerney, 129 Cal. 29, 61 Pac. 575, 948; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Berolzheimer v. Strauss, 7 Civ. Proc. 225, 51 N. Y. Super. Ct. 96; Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D, 1143 and note (revg. judgment 154 App. Div. 925, 136 N. Y. S. 81); Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Richards v. Baurman, 65 N. Car. 162; Durbin v. Barber, 14 Ohio 311; Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Isler v. Baker, 6 Humph.

§ 583. Dissolution for insanity.—Insanity does not ipso facto operate to dissolve a partnership. There must ordinarily be some act by a court of competent jurisdiction, whereby the relation is terminated. The reason is obvious. In order to constitute a valid partnership inter sese there must be a meeting of minds of the persons assuming the partnership. Each member has a right to the rational advice and aid of his copartner, in the absence of a contract or a rule of law to the contrary. Each has the right to the protection and the care which a reasonable man would or could bestow. How necessary it then is for each person in the firm to be in his right mind and reason, may be seen. In an English case[81] the court laid down the following rule of law upon the subject: "It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership because it is immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is afflicted with insanity, the continuing partner may, if he think fit, make it a ground of dissolution, but in that case I consider with Lord Kenyon that in order to make it a ground of dissolution he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope, there can be no dissolution." It can thus be seen that dissolution on the

(Tenn.) 85; Swepson v. Davis (Tenn. Ch.), 60 S. W. 619; Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Wood v. Beath, 23 Wis. 254. Dissolution by contract, however, precludes action for same. Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327. See further Hoffman v. Hauptner, 135 App. Div. (N. Y.) 148, 119 N. Y. S. 1022; Connelley v. Custer, 52 Wash. 697, 100 Pac. 335.

[81] Jones v. Noy, 2 Myl. & K. 125, 3 L. J. Ch. 14.

ground of insanity may be very difficult to determine. The insanity must be clearly proven. The question may also arise as to the degree of mental impairment and the length of time thereof. It would be safe to say that both must be such as to render the affected partner incapable of assuming his duties to the firm. Lord Kenyon says:[82] "If I was clearly satisfied that Bennet (the alleged insane partner) was restored to a sound mind, and could afford the proper assistance to Sayer, the partnership ought not to be dissolved. * * * If he has merely a ray of intellect, I ought not to re-engraft him in his partnership." A Louisiana case[83] held that where one party is insane, and the other member of the partnership conducts the business of the firm, without a notice that the firm is dissolved (according to the Louisiana statute), the firm continues and there is no dissolution by reason of the insanity ipso facto, regardless of the insanity being notorious and unmistakable. There are, however, one or two cases contrary to the above general rule, which hold that such a principle is dangerous, the theory being that an insane partner might, with the broad powers of agency given his copartners, be heavily involved before there could be a judicial decree dissolving the firm, and which would not have occurred had they had the benefit of his sane and rational advice.[84] There could be little reason for fear of the contracts of the insane partner, however, especially if he were apparently insane, as his contracts could be avoided upon this ground. The following general rules may be stated: Insanity of a partner, even though adjudicated, does not ipso facto work a dissolution of the partnership.[85]

[82] Sayer v. Bennett, 1 Cox 107.

[83] Jurgens v. Ittman, 47 La. Ann. 367 (1895). See also Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112.

[84] Parsons Partnership, p. 362; Isler v. Baker, 6 Humph. (Tenn.) 85. See also Cape Sable Co's Case, 3 Bland (Md.) 606.

[85] Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Cresse v. Loper, 72 N. J. Eq. 784, 65 Atl. 1001; Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839 and note, Ann. Cas. 1913 D, 1143 and note; Friedburgher v. Jaberg, 20 Abb. N. Cas. 279, 11 N. Y. St. 718; Sander v. Sander, 2 Coll. Ch. Cas. 276; Sayer v. Bennet, 1 Cox Ch. 107; Kirby v. Carr, 2 Jur. 741, 8 L. J. Exch. 31, 3 Y. & C. Exch. 184, 2 Jur. 741;

Where insanity of a permanent, hopeless nature beclouds the mind of one of the members of the firm, equity may properly dissolve the partnership.[86] Where insanity is merely of a temporary character with a prospect of recovery, the partnership will not be dissolved.[87] As to dissolution for insanity the Uniform Partnership Act merely declares the general rule.[88] The Uniform Partnership Act provides that dissolution by decree of court may be

Anonymous, 2 Kay & J. 441; Jones v. Noy, 2 Myl. & K. 125, 3 L. J. Ch. 14; Fisher v. Melles, L. R. 18 Eq. Cas. 268n; Wrexham v. Hudleston, 1 Swanst. 514n. See also Sadler v. Lee, 6 Beav. 324, 7 Jur. 476, 12 L. J. Ch. 407; Reynolds v. Austin, 4 Del. Ch. 24; Davis v. Lane, 10 N. H. 156; Griswold v. Waddington, 15 Johns. (N. Y.) 57 (affd. 16 Johns. 438); Page v. Vankirk, 1 Brewst. (Pa.) 282. And see the note to Breaux v. Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403.

[86] "The rule supported by the decided weight of authority, and announcing the correct doctrine, is that the insanity of a partner does not, per se, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine must be understood and is applied by courts of equity with appropriate limitations and restrictions; for, while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, * * * yet it will not authorize a court of chancery to decree a dissolution of a partnership, if the malady be temporary only, with a fair prospect of recovery within a reasonable time." Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112. See also Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D. 1143 and note (revg. judgment 154 App. Div. 925, 139 N. Y. S. 81); Jones v. Noy, 2 Myl. & K. 125, 3 L. J. Ch. 14; Jones v. Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. 487, 22 W. R. 785; Whitwell v. Arthur, 35 Beav. 140; Kirby v. Carr, 3 Younge & C. 184, L. J. Ex. Eq. 31, 2 Jur. 741; Rowland v. Evans, 30 Beav. 302; Waters v. Taylor, 2 Ves. & B. 299, 13 R. R. 91; Leaf v. Coles, 1 De G., M. & G. 171; Bagshaw v. Parker, 10 Beav. 532; Milne v. Bartlett, 8 L. J. Ch. 254, 3 Jur. 358; Jurgens v. Ittmann, 47 La. Ann. 367, 16 So. 952; Griswold v. Waddington, 15 Johns, (N. Y.) 57 (affd. 16 Johns. (N. Y.) 438); Friedburgher v. Jaberg, 20 Abb. N. Cas. (N. Y.) 279, 11 N. Y. St. 718.

[87] Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D, 1143 and note; Leaf v. Coles, 1 De G., M. & G. 171; Jones v. Lloyd, 43 L. J. Ch. 826, L. R. 18 Eq. 265, 30 L. T. 487, 22 W. R. 785; Jones v. Noy, 2 Myl. & K. 125; Sayer v. Bennett, 1 Cox 107; Patey v. Patey, 5 L. J. Ch. 198; Anonymous, 2 Kay & J. 441; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112.

[88] Uniform Partnership Act, § 32 (1, a).

had on application by or for a partner. Ordinarily dissolution because of a partner's insanity is asked by a copartner, but it is held that the dissolution may be at the instance of the partner of unsound mind not so adjudicated by his next friend, the court saying:[89] "If this were not the law anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance to him and his property, without there being any remedy whatever." A dissolution for lunacy will not ordinarily be dated as from the beginning of the lunacy.[90]

§ 584. Dissolution for other incapacity of partner.—Likewise, it has been declared that a bill for dissolution may be predicated on either the ill health or physical incapacity of a partner which prevents him from performing the duties incumbent on him in the business,[91] or upon his lack of requisite skill.[92] In the leading American case on this subject it was said:[93] "the cases and text-writers, as well as common sense, make it apparent that 'permanent' incapacity as a ground for dissolution does not, and should not, mean incurable and perpetual disability during the life of the partner. It means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote, which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect

[89] Jones v. Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. 487, 22 W. R. 785.

[90] Sander v. Sander, 2 Coll. Ch. Cas. 276; Besch v. Frolich, 1 Phila. (Pa.) 172; Sayer v. Bennet, 1 Cox 107; Anonymous, 2 Kay & J. 441.

[91] Casky v. Casky, 5 Ky. L. (abstract) 775; Whitwell v. Arthur, 35 Beav. 140; Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D, 1143 and note.

[92] Caskey v. Casky, 5 Ky. L. (abstract) 775.

[93] Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D, 1143 (revg. Barclay v. Barrie, 142 App. Div. 670, 127 N. Y. S. 403, in which it is held that a partnership will not be dissolved because one of the parties suffered a paralytic stroke when there was a probability that he would be able to resume his partnership duties before the expiration of the partnership term). See also Barclay v. Barrie, 64 Misc. 403, 119 N. Y. S. 463.

and obstruct the purpose of the partnership. It would seem that there ought to be no doubt or difference of opinion concerning the proposition that when a partner has been totally incapacitated from attending to his duties for three years and eleven months out of a partnership period of four years and eleven months, with no assurances that he will recover before the expiration of the unexpired balance of twelve months, the incapacity has been of a permanent, and not a temporary or fleeting character, and of a substantial, and not inconsequential, nature, and that the purpose of his partners in joining him with them has been materially and essentially defeated." And the court was inclined to think that, the cause having been in court for several years, until after the expiration of the partnership period, equity would demand that the dissolution be dated as of the beginning of the action, since the delay was without the plaintiff partner's fault

§ 585. Dissolution for conduct prejudicially affecting carrying on of business.—The clause of the Uniform Partnership Act permitting dissolution to be decreed for conduct of a partner which tends prejudicially to affect the carrying on of the business,[94] and the next clause permitting dissolution whenever a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,[95] are very similar to provisions of the English Partnership Act.[96] While the general law has always recognized the right to a dissolution because of a partner's misconduct, it may seem at first rather difficult to distinguish between the kinds of misconduct mentioned in each of these clauses, there seemingly being an overlapping. However, under the first clause the objectionable misconduct need not be connected with the business,

[94] Uniform Partnership Act, § 32 (1, c).

[95] Uniform Partnership Act, § 32 (1, d).

[96] English Partnership Act, § 35 (c), (d).

but it must be of such a nature, with regard to the particular business of the firm, that it is calculated to injure it,[97] and Mr. Lindley says: "for instance, gambling on the stock exchange, though such gambling may in no way be connected with the business of the firm, would probably in most cases be ground for dissolution."[98] So it seems a partner has a right to a dissolution if a copartner has become liable to a criminal prosecution because guilty of a fraudulent breach of trust.[99] And a dentist who issued advertisements disparaging and imputing misconduct to other dentists was held guilty of professional misconduct.[1] Habitual intoxication, extravagance and dishonesty are good grounds for dissolution.[2] It was said in a leading American case:[3] * * * "Gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury in the partnership concerns, or renders it impracticable to carry on the business, is good ground for a dissolution at the suit of the injured partner. Habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership justifies a dissolution; but then it must be a clear case of positive or meditated abuse to authorize such a decree. For minor misconduct and grievances, if they require redress, the court will interfere by way of injunction, to prevent the mischief."[4] A dissolution may be decreed for a partner's acts which show his deliberate resolve to break up and ruin the firm business.[5]

§ 586. For wilful or persistent breach of partnership agreement.—A dissolution may be decreed for wilful and

[97] Lindley Partnership (8 ed.), p. 655.

[98] Lindley Partnership (8 ed.), p. 655, citing Pearce v. Foster, 55 L. J. Q. B. 306, 17 Q. B. D. 536, 54 L. T. 664, 34 W. R. 602, 51 J. P. 213; Carmichael v. Evans [1904], 1 Ch. 486.

[99] Essel v. Hayward, 30 Beav. 158, 29 L. J. Ch. 806, 6 Jur. (N. S.) 690, 8 W. R. 593.

[1] Clifford v. Timms (1908), A. C. 12 (affg. [1907] 2 Ch. 236).

[2] Ambler v. Whipple, 20 Wall. (U. S.) 546, 23 L. ed. 403.

[3] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376.

[4] See Marnet Oil & Gas Co. v. Staley, 218 Fed. 45.

[5] Sutro v. Wagner, 23 N. J. Eq. 388 (affd. 24 N. J. Eq. 389).

persistent breach of the partnership articles by a partner.[6] "A partner is under no obligation to continue a member of a partnership when his copartner persistently and wilfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm, and resorting to his action at law upon the partnership contract for redress."[7] So dissolution has been decreed where a partner failed to contribute capital or funds as he had agreed to, when such contribution was required to successfully carry on the business.[8] So the abandonment or desertion of the partnership business is ground for a dissolution by decree of court.[9] It has even been held in a few cases that abandonment works a dissolution ipso facto.[10] The inability of one partner to perform his obligations and to contribute his skill, diligence and labor may be ground for dissolution by decree.[11] So is the loan of firm money contrary to the partnership articles;[12] or refusal to make monthly balances and pay differences, as agreed;[13] or to pay over proceeds of sales as required by the partnership articles.[14] It seems that dissolution may be properly decreed on account of bad faith in the matter of the partnership accounts or failure to keep them;[15] or of the disposition of firm property in settle-

[6] Uniform Partnership Act, § 32 (1, d). See Moore v. Price, 116 Ala. 247, 22 So. 531; Breaux v. Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403; Bruce v. Ross, 18 La. 341; Abbott v. Johnson, 32 N. H. 9; Westwood v. Cole, 66 Misc. 53, 120 N. Y. S. 884; Durbin v. Barber, 14 Ohio 311.

[7] Rosenstein v. Burns, 41 Fed. 841.

[8] Boyd v. Mynatt, 4 Ala. 79; Turnipseed v. Goodwin, 9 Ala. 372; Breaux v. Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403; Hartman v. Woehr, 18 N. J. Eq. 383; Brien v. Harriman, 1 Tenn. Ch. 467; Wood v. Beath, 23 Wis. 254.

[9] Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Ligare v. Peacock, 109 Ill. 94.

[10] Beaver v. Lewis, 14 Ark. 138; Whitman v. Leonard, 3 Pick. (Mass.) 177; Potter v. Moses, 1 R. I. 430; Ayer v. Ayer, 41 Vt. 346.

[11] Fogg v. Johnston, 27 Ala. 432, 62 Am. Dec. 771.

[12] Dumont v. Ruepprecht, 38 Ala. 175.

[13] Meaher v. Cox, 37 Ala. 201.

[14] Maher v. Bull, 44 Ill. 97.

[15] Cheesman v. Price, 35 Beav. 142; Cottle v. Leitch, 35 Cal. 434; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Werner v. Leisen, 31 Wis. 169; Wood v. Beath, 23 Wis. 254.

ment of private debts;[16] or fraudulent conduct toward copartners.[17]

§ 587. When further concerted action impracticable.—Again, equity will administer relief to a partner whose associate so conducts himself in other ways than by breach of the partnership agreement as to render further concerted action impracticable.[18] This rule may be applied where there are constant quarrels, irreconcilable differences and personal ill-will which make co-operation impossible.[19] "But it is not considered to be the duty of the court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or misconduct of one or more of the partners unless the others are in effect excluded from the concern, or unless the misconduct is of such a nature as utterly to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together."[20] "That such em-

[16] Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

[17] Lisco v. Husmann, 98 Nebr. 276, 152 N. W. 383; Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63.

[18] Harrison v. Tennant, 21 Beav. 482; Watney v. Wells, 30 Beav. 56; Goodman v. Whitcomb, 1 Jac. & W. 589; Smith v. Jeyes, 4 Beav. 503; Anonymous, 2 Kay & J. 441; Rosenstein v. Burns, 41 Fed. 841; Moore v. Price, 116 Ala. 247, 22 So. 531; Meaher v. Cox, 37 Ala. 201; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Cash v. Earnshaw, 66 Ill. 402; Lev. v. Karrick, 8 Iowa 150; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534; Flammer v. Green, 47 N. Y. Super. Ct. 538; Llorens v. Costa, 5 N. Y. Wkly Dig. 484; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Berry v. Cross, 3 Sandf. Ch. (N. Y.) 1; Reiter v. Morton, 96 Pa. St. 229; Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Page v. Vankirk, 1 Brewst. (Pa.) 282; Singer v. Heller, 40 Wis. 544; Werner v. Leisen, 31 Wis. 169.

[19] Fooks v. Williams, 120 Md. 436, 87 Atl. 692; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Whitman v. Robinson, 21 Md. 30; Philip v. Von Raven, 26 Misc. 552, 57 N. Y. S. 701; Lafond v. Deems, 1 Abb. N. Cas. 318, 52 How. Pr. 41 (revd. 81 N. Y. 507, 8 Abb. N. Cas. 344); Singer v. Heller, 40 Wis. 544; Leary v. Shont, 33 Beav. 582; Baxter v. West, 1 Drew & Sm. 173.

[20] Lindley Partnership, 580. See also Cash v. Earnshaw, 66 Ill. 402; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Loomis v. McKenzie, 31

bittered relations may exist as would render it impracticable to conduct the business, and justify a decree dissolving the partnership, admits of no discussion, on principle as well as upon authority. Permanent mischiefs would be the result, that could only be avoided by a severance of the partnership relations. * * * In all the cases we have examined, where the partnership has been dissolved on account of the unfriendly relations between the partners, it has generally been at the instance of the party who was not himself at fault, and where the estrangement was such as would prevent the successful management of the business. A party who is the author of the ill-feeling between himself and partners ought not to be permitted to make the relation he has induced, the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty. The results flowing from the premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise."[21]

So the partner who has caused such want of confidence that the business can not be carried on together is not entitled to a dissolution.[22] But a partner who refuses to allow his associate to participate in the management of the common business can not, it seems, successfully resist the termination by a court

Iowa 425; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Fischer v. Raab, 57 How. Pr. (N. Y.) 87; Lafond v. Deems, 1 Abb. N. Cas. 318, 52 How. Pr. (N. Y.) 41 (revd. 81 N. Y. 507, 8 Abb. N. Cas. 344); Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Sloan v. Moore, 37 Pa. St. 217; Andersen v. Andersen, 25 Beav. 190.

[21] Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438.

[22] Meaher v. Cox, 37 Ala. 201; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Bush v. Linthicum, 59 Md. 344; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Sutro v. Wagner, 23 N. J. Eq. 388 (affd. 24 N. J. Eq. 589); Watney v. Wells, 30 Beav. 56; Harrison v. Tennant, 21 Beav. 482; Smith v. Jeyes, 4 Beav. 503; Waters v. Taylor, 2 Ves. & B. 299, 13 R. R. 91; Newton v. Doran, 1 Grant Ch. U. C. 590.

of equity of the existence of the firm.[23] The same rule applies where one partner refuses to consult the other about the business.[24] Where a lack of harmony and agreement impair the carrying out of the purpose for which the partnership was formed, dissolution may undoubtedly be required,[25] as it also may, apparently, when any one of the partners insists upon ignoring the business meetings of the firm.[26] On the other hand, a partner will not, it seems, be compelled to suffer the penalty of dissolu-

[23] "If part of the capital of an agreed partnership has been paid, accepted, and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved, and a mere exclusion of such person by the others from the business of the firm by illegal acts on their part is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part." Hartman v. Woehr, 18 N. J. Eq. 383. See also Einstein v. Schnebly, 89 Fed. 540; Gillett v. Higgins, 142 Ala. 444, 38 So. 664, 4 Am. Cas. 459 and note; Gorman v. Russell, 14 Cal. 531; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359; Hartman v. Woehr, 18 N. J. Eq. 383; Wilcox v. Pratt, 52 Hun 340, 5 N. Y. S. 361, 23 N. Y. St. 686 (affd. 125 N. Y. 688, 3 Silvernail Ct. App. 199, 25 N. E. 1091); Candee v. Baker, 131 App. Div. 641, 116 N. Y. S. 55; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590; Werner v. Leisen, 31 Wis. 169. And compare Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 514; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Smith v. Fagan, 17 Cal. 178; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; Wilcox v. Pratt, 52 Hun 340, 5 N. Y. S. 361, 23 N. Y. St. 686 (affd. 125 N. Y. 688, 3 Silv. Ct. App. 199, 25 N. E. 1091); Roberts v. Eberhart, 1 Kay 148, 23 L. J. Ch. 201, 2 W. R. 125; Goodman v. Whitcomb, 1 Jac. & W. 589.

[24] "If, as alleged, the defendant is insolvent, and has taken possession of the partnership's property and converted the same to his own use, and refused to consult or allow the plaintiff to participate in the management of the firm's business, it is a sufficient ground to dissolve the partnership, and to entitle the plaintiff to the settlement thereof." Havner v. Stephens, 22 Ky. L. 498, 58 S. W. 372. See also Leary v. Shont, 33 Beav. 582; Waters v. Taylor, 2 Ves. & B. 299, 13 R. R. 91.

[25] Meaher v. Cox, 37 Ala. 201; Pease v. Hewitt, 31 Beav. 22, 8 Jur. (N. S.) 1166, 7 L. T. 11, 10 W. R. 535; Baxter v. West, 1 Drew & Sm. 173; Moore v. Price, 116 Ala. 247, 22 So. 531; Null v. Parsons, 145 Ill. App. 436; Sutro v. Wagner, 23 N. J. Eq. 388 (affd. 24 N. J. Eq. 589); Philipp v. Von Raven, 26 Misc. 552, 57 N. Y. S. 701.

[26] De Berenger v. Hamel, 7 Jar. Byth. (2d ed.) 25.

tion by reason of a mere error of judgment,[27] or because of conduct toward some of the customers of the firm which may be deserving of severe criticism, but which involves no permanent injury to the partnership interest.[28] It thus appears that, generally speaking, any circumstance which makes practically impossible the continuation of the partnership or the attainment of its purpose, is sufficient to warrant its dissolution.[29]

§ 588. When business can only be carried on at loss.— Dissolution may also be decreed on the fact that loss only will accompany the prosecution of the business should the same be continued until the arrival of the time anteriorly determined upon as that at which the partnership relation was to cease.[30] A partner "is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a failure of the business itself." He is not "required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership."[31] The law is well and clearly settled affirmatively as to the right of a court to dissolve a partnership where certain matters have made the continuance of the partnership impossible or disadvantageous to the partners. When the partners enter the relation, they do so in contemplation of a profit thereby. If, then, it be clearly shown that a profit can not be made, a court will, upon proper application and showing order a dissolu-

[27] Cash v. Earnshaw, 66 Ill. 402.

[28] Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438.

[29] "The court will require a strong case to be made, and it is laid down as a general principle, a court of equity has no jurisdiction to declare a separation between partners for trifling causes or temporary grievances, involving no permanent mischiefs." Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438. See further Jackson v. Deese, 35 Ga. 84; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; McBurnie v. Semple, 14 Ky. L. 30, 19 S. W. 183.

[30] See Jennings v. Baddeley, 3 Kay & J. 78, 3 Jur. (N. S.) 108; Wilson v. Church, 13 Ch. Div. 1; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Holladay v. Elliott, 8 Ore. 84; Heck v. McEwen, 12 Lea (Tenn.) 97.

[31] Rosenstein v. Burns, 41 Fed. 841.

tion of the firm.[32] One example is where a partnership is formed wholly for the express purpose of promoting a certain patent, which proves a total failure.[33] It is likewise held that, in a case where, in order to make the business profitable, there must be money advanced by the partners, and one or both are either unwilling or unable, the partnership may be dissolved.[34] In another case[35] it is held that whenever the conditions of a partnership are incapable of being filled, or the fruits arising from it can not be properly enjoyed, a good cause for renunciation is furnished. A New York case[36] holds that a dissolution will be decreed where the whole partnership scheme is found to be visionary, impracticable, or founded upon erroneous principles. It might be inquired why the matter should be brought into court, instead of the parties dissolving the firm by mutual consent. This question may be answered by saying that one of the partners, by reason of personal enmity, or otherwise, might refuse to dissolve the firm by mutual consent, and cases may be conceived where the withdrawal by one, without the consent of the other, might give rise to an action for damages, while a dissolution by judicial decree, for the above grounds will not, by reason alone thereof, give any such right of action. The rule would be modified if the condition of the firm should be shown to be due to the fault of one or more of the members, less than all. In such a case the offending party might be liable to his partner for damages for his wrong, but, as is plainly seen, his liability does not grow from the dissolution of the firm, but for his wrongful actions from which the dissolution results.

[32] Jennings v. Baddeley, 3 Kay & J. 78, 3 Jur. (N. S.) 108; Harrison v. Tennant, 21 Beav. 482; Bailey v. Ford, 13 Sim. 495, 12 L. J. Ch. 482; Rosenstein v. Burns, 135 U. S. 449, 41 Fed. 841, 34 L. ed. 193; Brown v. Hicks, 8 Fed. 155; Meaher v. Cox, 37 Ala. 201; Dunn v. McNaught, 38 Ga. 179; Jackson v. Deese, 35 Ga. 84; Moies v. O'Neill, 23 N. J. Eq. 207; Holladay v. Elliott, 8 Ore. 85; Brien v. Harriman, 1 Tenn. Ch. 467.

[33] Baring v. Dix, 1 Cox 213, 1 R. R. 23.

[34] Weissenborn v. Sieghortner, 21 N. J. Eq. 483.

[35] Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376.

[36] Lafond v. Deems, 52 How. Pr. (N. Y.) 41, 1 Abb. N. Cas. 318.

§ 589. For fraud in inception of relation.—The Uniform Partnership Act permits dissolution when other circumstances than those named which have been previously treated, render it equitable.[37] This, under the general law, the court will undoubtedly do when it appears that the party seeking release was induced to become a partner by means of fraud or deceit,[38] or, at the option of the complainant, it will where there has been no ratification of the partnership agreement after the fraud was discovered,[39] decree a rescission of the same and require the defendants to place their associate in statu quo.[40]

§ 590. Annulment of partnership.—The question of the annulment of partnerships is here treated, not as a form of dissolution, but as analogous thereto. The difference consists in this: that dissolution refers to the severing of a relation, while annulment is simply the finding of a court that no such relation has existed. The one includes future relations, the other refers to all firm connections. Thus, it may be said that there is, in fact, no such thing possible as the annulment of a partnership, as the term itself implies that there never has been any partnership. Perhaps the logical term would be annulment of an apparent partnership. The distinction between true partnerships

[37] Uniform Partnership Act, § 32 (1, f).

[38] "If he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practiced upon him becomes known." He is not "required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership." Rosenstein v. Burns, 41 Fed. 841. See further Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Oteri v. Soalzo, 145 U. S. 578, 36 L. ed. 824, 12 Sup. Ct. 895; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Gibson v. Cunningham, 92 Mo. 131, 5 S. W. 12; Harlow v. La Brum, 82 Hun 292, 64 N. Y. St. 72, 31 N. Y. S. 487 (affd. 151 N. Y. 278, 45 N. E. 859); Jones v. Weir, 217 Pa. 321, 10 Ann. Cas. 692.

[39] St. John v. Hendrickson, 81 Ind. 350. And compare Hunter v. Whitehead, 42 Mo. 524.

[40] Newbigging v. Adam, 34 Ch. Div. 582; Mycock v. Beatson, 13 Ch. Div. 384, 49 L. J. Ch. 127, 42 L. T. 141, 28 W. R. 319; Pillans v. Harkness, Colles 442; Rawlins v. Wickham, 3 De G. & J. 304; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Richards v. Todd, 127 Mass. 167. See post § 776 on rescission.

inter sese and partnership liability as to others must be kept in mind, in order to get the full import of this subject. According to the principles heretofore discussed, there can be no annulment of partnership liability inter alios, unless the third parties, who have obtained rights against the firm, have done so with knowledge of the true condition of affairs, or otherwise have not acted in a bona-fide manner. As to an apparent partnership, however, between the parties themselves, or as to third parties, in some instances, who have knowledge of the true conditions between the partners there may be an annulment which will make the apparent partnership void ab initio, and which will leave all such parties without any rights against the apparent firm. The rule is well stated in a Massachusetts case[41] in which case Richards, by alteration of books, and in other ways, fraudulently induced Todd to enter the firm. The court, in its opinion held that: "The effect of Todd's election to avoid the contract for the fraud practiced on him is that, as between the parties, there has never existed any copartnership. * * * It is also clear that as Todd, by holding himself out as a member of a firm, rendered himself liable to the creditors of such apparent firm, Richards should, in order to place him in statu quo, indemnify him against the claims of such creditors." The usual ground of annulment of the contract is fraud or misrepresentation.[42] Owing, perhaps, to the difficulties which have been suggested courts have hesitated in annuling partnerships except upon

[41] Richards v. Todd, 127 Mass. 167.

[42] See Richards v. Todd, 127 Mass. 167; Oteri v. Scalzo, 145 U. S. 578, 588, 12 Sup. Ct. 895, 36 L. ed. 824; Perry v. Hale, 143 Mass. 540, 10 N. E. 174; Smith v. Everett, 126 Mass. 304; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Gibson v. Cunningham, 92 Mo. 131, 5 S. W. 12; Hunter v. Whitehead, 42 Mo. 524; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; More v. Rand, 60 N. Y. 208; Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. S. 372; Kimmins v. Wilson, 8 W. Va. 584; Newbigging v. Adam, 34 Ch. Div. 582; Jennings v. Broughton, 17 Beav. 234 (affd. 5 DeG., M. & G. 125); Hamil v. Stokes, 4 Price 161; Andrews v. Garstin, 10 C. B. (N. S.) 444; Stainbank v. Fernley, 9 Sim. 556; Rawlins v. Wickham, 1 Giff. 355, 3 DeG. & J. 304; Colt v. Woollaston, 2 P. Wms. 154; Green v. Barrett, 1 Sim. 45; Pillans v. Harkness, Colles 442; Redgrave v. Hurd, 20 Ch. Div. 1.

strong proof and ample grounds.[43] Moreover, the usual rules of ratification and of estoppel apply, and a partner who becomes cognizant of the fraudulent nature of the partnership contract, and thereafter recognizes it as valid, can not have the partnership annulled, and the ratification will be ab initio.[44] The Uniform Partnership Act provides for damages and indemnity to one who is entitled to rescind a partnership contract because of fraud and misrepresentation in its inception and for liens on firm property and subrogation to creditors' rights in order to secure a partner who has paid out money because of such fraud.[45]

§ 591. Dissolution by transfer of partner's interest.—As regards the effect of the transfer of one partner's interest, the Uniform Partnership Act, while clarifying the rules of law generally, is not supported in all respects by the decisions. Under its provisions the transfer of a partner's interest, either by voluntary or forced sale, does not automatically work a dissolution, but a purchaser of a partner's interest, who is otherwise entitled merely to receive the profits to which the assigning partner would have been entitled, may, at the expiration of the specified partnership term or particular undertaking, or at any time if the partnership was at will when assigned or charged, apply to court for a decree of dissolution.[46] Under the law in states where this act has not been adopted, a transfer of a partner's interest does not always work a dissolution, but it seems that the reason for this is usually that there is an agreement to the contrary. In a New York case[47] one partner made an assignment of all his property, including his interest in the partnership. In an action growing out of this assignment, the court said: "It does not seem to be disputed by either party to this controversy that the act of Beadle in assigning his whole prop-

[43] Gerard v. Gateau, 84 Ill. 121.

[44] Andriessen's Appeal, 123 Pa. St. 303, 16 Atl. 840; St. John v. Hendrickson, 81 Ind. 350; Evans v. Montgomery, 50 Iowa 325; Jennings v. Broughton, 17 Beav. 234 (affd. 5 DeG., M. & G. 126).

[45] Uniform Partnership Act, § 39.

[46] Uniform Partnership Act, §§ 27, 28, 32 (2).

[47] Ogden v. Arnot, 29 Hun (N. Y.) 146 (1883).

erty, including, therefore, whatever might belong to him in the partnership, worked a dissolution of the partnership. This must be so, because one partner can not against the will of the other, introduce a new member into the partnership."[48] The court further held that the right of closing up the business of the firm belonged to the remaining partner, subject, of course, to the control of the court. In another case[49] holding the same principle, an exception is added that where the assignment is from one partner to another, there is not, ipso facto, a dissolution of the partnership. "Whether it shall so operate depends on its terms, and the intention of the parties, as from these it may be collected. If the withdrawal of the assignor from the partnership is contemplated,—if there is a termination of his authority and duty as a partner, and as between him and the assignee, exemption from liability for the future transactions which may be had by the assignee, in the prosecution of the original undertaking, it is as to them a dissolution.[50] But when the assignment is intended as a mere security for a debt, and is to operate only on the share of the net profits of the assignor, on a settlement of the partnership transactions, at the expiration of the partnership, and he remains bound to all duties as partner—bound to contribute time, labor, and skill to the prosecution of the common undertaking,—it will not operate a dissolution, not even as between the partners themselves."[51] It should not be understood that there can not be an assignment of interest by one partner to a third party without closing the business, as the remaining partner may accept the assignee of his withdrawing partner into partnership, but this in itself creates a new partnership, with the business of the old one, which is itself dissolved. Moreover, if there were a stipulation in the partnership agreement that a partner could transfer his interest or a part thereof to a third party, and that the third party would be ac-

[48] Citing Marquand v. New York Manf. Co., 17 Johns. (N. Y.) 525; Story Partnership, 307.

[49] Monroe v. Hamilton, 60 Ala. 226 (1877).

[50] Citing Parsons Partnership, 400.

[51] Citing Taft v. Buffum, 14 Pick. (Mass.) 322, and Buford v. Neely, 2 Dev. (N. Car.) 481.

cepted as a partner by the other members, the contract would govern, and the assignment would not work a dissolution of the partnership. As expressed in one case: "It is said that an assignment of a partner's interest works a dissolution of the firm, and many authorities are cited to sustain this proposition. The reason for the rule is that a partner can not introduce a new member into the firm without the consent of the other members, nor make them members of another firm; but there is no rule of law which forbids a partnership, with the consent of all its members, to admit a new member, and when members so taken in are recognized and treated by all as partners, and the business is continued with them under the original agreement, this is sufficient to make them partners, and does not work a dissolution of the firm."[52] But as a general rule, any change in the membership of a firm operates as a dissolution of the same and the formation of a new partnership.[53] And by the weight of authority, the transfer of a partner's interest works a dissolution of the partnership, ipso facto, if a partnership at will and furnishes ground for dissolution by decree on application of a partner or the purchaser where the partnership was for a fixed term,[54] except, perhaps, when such transfer is contemplated by

[52] Gorder v. Pankonin, 83 Nebr. 204, 119 N. W. 449, 131 Am. St. 629.

[53] Webb v. Butler (Ala.), 68 So. 369; Hatchett v. Blanton, 72 Ala. 423; Zimmerman v. Harding, 33 S. Ct. 387, 227 U. S. 489, 57 L. ed. 608; Ross v. Cornell, 45 Cal. 133; McCall v. Moss, 112 Ill. 493; Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; White v. White, 5 Gill (Md.) 359; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Houghton v. Bradley, 113 Mich. 599, 71 N. W. 1112; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Mudd v. Bast, 34 Mo. 465; Henry v. Mahone, 23 Mo. App. 83; Hutchinson v. Sperry, 158 App. Div. 704, 143 N. Y. S. 876 (revg. judgment 140 N. Y. S. 220, 79 Misc. 523); Potter v. Moses, 1 R. I. 430; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Euless v. Tomlinson (Tex. Civ. App.), 38 S. W. 534; Mensing v. Atchison (Tex. Civ. App.), 26 S. W. 509; Shedd v. Bank of Brattleboro, 32 Vt. 709; Peters v. McWilliams, 78 Va. 567. See ante §§ 224, 550. And compare Rice v. Maddox, 9 N. Y. S. 524, 16 Daly 156, 30 N. Y. St. 550. Apparently, however, a change in the name of the firm without any change in the membership thereof does not work a dissolution of the partnership. Billingsley v. Dawson, 27 Iowa 210; Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983; Gill v. Ferris, 82 Mo. 156.

[54] In re Suprenant, 217 Fed. 470; Karrick v. Hannaman, 168 U. S. 328,

18 S. Ct. 135, 42 L. ed. 484; Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Miller v. Brigham, 50 Cal. 615; Bradley v. Harkness, 26 Cal. 69; Schleicher v. Walker, 28 Fla. 680, 10 So. 33; Phelps v. State, 109 Ga. 115, 34 S. E. 210; Edens v. Williams, 36 Ill. 252; Clark v. Carr, 45 Ill. App. 469; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Barkley v. Tapp, 87 Ind. 25; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Reece v. Hoyt, 4 Ind. 169; Chase v. Scott, 33 Iowa 309; McAdams' Exrs. v. Hawes, 9 Bush (Ky.) 15; Conwell v. Sandidge, 5 Dana (Ky.) 210; Spaunhorst v. Link, 46 Mo. 197; Freeman v. Hemenway, 75 Mo. App. 611; Tennent v. Guenther, 31 Mo. App. 429; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448 (affd. 65 N. J. Eq. 404, 54 Atl. 1125); Renton v. Chaplain, 9 N. J. Eq. 62; Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; De Manderfield v. Field, 7 N. Mex. 17, 32 Pac. 146; Comstock v. Buchanan, 57 Barb. (N. Y.) 127 (affd. 57 Barb. (N. Y.) 146, and note); Mumford v. McKay, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Sistare v. Cushing, 4 Hun (N. Y.) 503; Eilers Music House v. Reine, 65 Ore. 598, 133 Pac. 788; Swoope v. Wakefield, 10 Pa. Super. Ct. 342; Wilson v. Waugh, 101 Pa. St. 233; In re Horton's Appeal, 13 Pa. St. 67; Power v. Kirk, 1 Pittsb. (Pa.) 510; Cochran v. Perry, 8 Watts & S. (Pa.) 262; Heck v. McEwen, 12 Lea (Tenn.) 97; Babb v. Mosby, 7 Lea (Tenn.) 105; Schuster v. Frendenthal, 74 Tex. 53, 11 S. W. 1051; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; Moore v. Steele, 67 Tex. 435, 3 S. W. 448; Carroll v. Evans, 27 Tex. 262; Sherk v. First Nat. Bank (Tex. Civ. App.), 152 S. W. 832; Sanchez v. Goldfrank (Tex. Civ. App.), 27 S. W. 204; Kellar v. Self, 5 Tex. Civ. App. 393, 24 S. W. 578; Schneider v. De Smith, 2 Posey Unrep. Cas. (Tex.) 317; Sandberg v. Scougale, 75 Wash. 313, 134 Pac. 1051; Heath v. Sansom, 4 B. & Ad. 172. See Waller v. Davis, 59 Iowa 103, 12 N. W. 798; Wiggin v. Goodwin, 63 Maine 389; Taft v. Buffum, 14 Pick. (Mass.) 322; Davis v. Megroz, 55 N. J. L. 427, 26 Atl. 1009; Rogers v. Nichols, 20 Tex. 719. And compare Cody v. Cody, 31 Ga. 619; State v. Quick, 10 Iowa 451; Russell v. Leland, 12 Allen (Mass.) 349; Russell v. White, 63 Mich. 409, 29 N. W. 865. This, however, does not apparently hold good as to mining partnerships. Settembre v. Putnam, 30 Cal. 490; Bissell v. Foss, 114 U. S. 252, 29 L. ed. 126, 5 Sup. Ct. 851; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; Harris v. Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. 475. "A commercial partnership is dissolved when one of the partners disposes of his interest, but a mining partnership, which results from the operation of a mine by some of the joint owners with the consent of the others, is not dissolved by the conveyance by one of these owners of his interest in the mine or the lease to a stranger; but the grantor then ceases to be a member of the copartnership, and the stranger becomes a partner in his place. The delectus personae which is an essential element of an ordinary partnership is not an indispensable attribute of a mining partner-

the partnership agreement,[55] but while in some cases it has been held that the formation of a corporation which takes over the business and all the assets of the firm works a dissolution of the partnership, the authorities do not, at first glance, speak as with one voice upon this subject.[56]

§ 592. Status of partnership after dissolution.—That the partnership continues even after dissolution for the purpose of settling its affairs, is so firmly settled that the citation in full of the numerous authorities holding to that effect is practically unnecessary.[57] It has been well said that: "Whenever a part-

ship." Loy v. Alston, 172 Fed. 90. See also Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

[55] Heck v. McEwen, 12 Lea (Tenn.) 97; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33.

[56] In a well-considered note appended to Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471, it is said: "Dissolution of Partnership by Reason of Formation of Corporation. The question indicated by the foregoing title has received a negative answer in some cases and a positive answer in others, but this is due not so much to differences of opinion with respect to the state of the law as variations in state of fact. It is probably safe to say that the mere formation of a corporation does not necessarily terminate the partnership which it succeeds, and that whether it does or not depends on the additional and peculiar facts and circumstances of each case. For instance, in determining this question it is important to observe whether the partners themselves intended the partnership should be dissolved, or whether the firm did in fact cease to do business and was succeeded in all things by the corporation. These and other facts and circumstances go to effect the result in the particular case. This question of the dissolution of a firm by the formation of a corporation has sometimes arisen in cases where no rights of third persons, like creditors, have intervened, and the circumstances of some cases have been held to indicate a dissolution while the circumstances in other cases have been held to negative it." See further Cape Sable Co.'s Case, 3 Bland Ch. (Md.) 606; Francklyn v. Sprague, 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. 951; Coggswell &c. Co. v. Coggswell (N. J. Eq.), 40 Atl. 213; Hennessy v. Griggs, 1 N. Dak. 52, 44 N. W. 1010. And compare Whitely v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Watkins v. Delahunty, 133 App. Div. (N. Y.) 422, 117 N. Y. S. 885; Ruettell v. Greenwich Ins. Co., 16 N. Dak. 546, 113 N. W. 1029; Metz v. Commercial Bank, 45 S. Car. 216, 23 S. E. 13. This subject will be more fully treated in a subsequent chapter on change of partnership into corporation.

[57] "I am satisfied that notwithstanding the dissolution of the partner-

nership is dissolved the object of the association is terminated, and nothing remains to be done except the arrangement of the affairs of the partnership; and until they are settled, as between the parties, the partnership may be said to continue. Engagements may be contracted which can not be fulfilled during its existence, exposed as partnerships are to sudden and extraordinary terminations. For the purpose, therefore, of making

ship, yet, for the purpose of fulfilling engagements made during its existence, it had a limited existence legally, and subsisted for such purpose, even after the act of dissolution by the parties." Johnson v. Totten, 3 Cal. 343, 58 Am. Dec. 412. "Upon a dissolution, each partner becomes chargeable with all the debts and claims he owes or is accountable for to the partnership, with all interest accruing upon the same debts and claims." McCoy v. Crosfield, 54 Ore. 591, 104 Pac. 423. "At dissolution, the powers of the partners over the partnership assets continue only so far as is necessary for the purpose of winding up the affairs of the partnership." Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359. All the partners are still bound after dissolution for the complete execution of a contract made during the existence of the partnership. Burdett v. Hayman, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019, 129 Am. St. 1014; Peacock v. Peacock, 16 Ves. Jr. 49-57; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Lockwood v. Comstock, Fed. Cas. No. 8449, 4 McLean (U. S.) 383; Barringer v. Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; Burr v. Williams, 20 Ark. 171; Whiting v. Farrand, 1 Conn. 60; Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Kemp v. Coffin, 3 G. Greene (Iowa) 190; Isenhart v. Hazen, 10 Kans. App. 577, 63 Pac. 451; Combs v. Boswell, 1 Dana (Ky.) 473; Vancleave v. Nelson, 49 La. Ann. 621, 21 So. 734; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190; Marlett v. Jackman, 3 Allen (Mass.) 287; Oliver v. Olmstead, 112 Mich. 483, 70 N. W. 1036; Barton v. Lovejoy, 56 Minn. 380, 57 N. W. 935, 45 Am. St. 482; Bank of Port Gibson v. Baugh, 9 Sm. & M. (Miss.) 290; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Hutchins v. Gilman, 9 N. H. 359; Baldwin v. Johnson, 1 N. J. Eq. 441; Gray v. Green, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. 596; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Galliott v. Planters' & Mechanics' Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; Anderson v. Norton, 15 Lea (Tenn.) 14, 54 Am. Rep. 400; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858; Torrey v. Baxter, 13 Vt. 452; Rootes v. Wellford, 4 Munf. (Va.) 215, 6 Am. Dec. 510; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Lange v. Kennedy, 20 Wis. 279. See Wilder v. Morris, 7 Bush (Ky.) 420. And compare Stephens v. Orman, 10 Fla. 9. See also 3 Elliott Ev., § 2572.

good outstanding engagements the partnership must in legal contemplation have a continuance, although, as between the parties themselves, it is actually determined."[58] Dissolution of a firm does not abrogate firm contracts nor change the liability of the partners to third persons on firm contracts.[59] Under the Uniform Partnership Act the relationship of partners may be said to continue after dissolution so far as necessary to wind up the business and complete transactions begun, except that there may be under some circumstances a partnership liability to persons who have no notice of the dissolution, and all the partners may be liable for acts of a partner who has no notice of dissolution by act of a partner, or death or bankruptcy of a partner.[60]

§ 593. Powers of partners after dissolution—Generally.—Generally, dissolution terminates all the implied powers of a partner to bind copartners by virtue of their mutual agency in the firm business,[61] except those incident to the completion of transactions begun and the winding up of the business.[62] And further than this as to persons having notice of the dissolution

[58] Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650.

[59] Hohnadel v. Ellsworth, 154 Ill. App. 484; Axton v. Kentucky Bottlers' Supply Co., 159 Ky. 51, 166 S. W. 776; In re Suprenant, 217 Fed. 470; Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512; Strickland v. Strickland, 95 S. Car. 492, 79 S. E. 520; Bagley v. Brack (Tex. Civ. App.), 154 S. W. 247.

[60] Uniform Partnership Act, §§ 29, 33, 34, 35.

[61] Bower v. Douglass, 25 Ga. 714; Brewster v. Hardeman, Dudley (Ga.) 138; Buard v. Lemée, 12 Rob. (La.) 243; Commercial Bank v. Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; Peters v. Gardere, 8 La. 565; Bank of Port Gibson v. Baugh, 9 Sm. & M. (Miss.) 290; Hutchins v. Gilman, 9 N. H. 359; Gansevoort v. Kennedy, 30 Barb. (N. Y.) 279; Stirnermaun v. Cowing, 7 Johns. Ch. (N. Y.) 275; Allison v. Davidson, 17 N. Car. 79; Benham v. Gray, 5 C. B. 138, 17 L. J. C. P. 50, 57 E. C. L. 138; Cleve v. Bickerdike, 5 Quebec Pr. 391.

[62] Uniform Partnership Act, § 33; Scott v. Atlanta Wood & Iron Novelty Works, 12 Ga. App. 216, 76 S. E. 1082; Brewster v. Hardeman, Dudley (Ga.) 138; Schlau v. Enzenbacher, 265 Ill. 626, 107 N. E. 107; Ketchum v. Larkin, 88 Iowa 215, 55 N. W. 472; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190; Holloway v. Turner, 61 Md. 217; Buxton v. Edwards, 134 Mass. 567; McArthur v. Oliver, 53 Mich. 305, 19 N. W. 5; Marietta &c. R. Co. v. Mowry, 28 Hun (N. Y.) 79; Ayer v. Ayer, 41 Vt. 346; Torrey v. Baxter, 13 Vt. 452; King v. Smith.

one partner can only bind his copartner by express authority.[63] Therefore, it has been said on good authority that the termination of a partnership changes the former general agency of each of the members of the dissolved firm into a special one.[64] "Before the partnership is dissolved, each member is the agent of the others, and the partnership will be bound by any contract made by a partner within the scope of the partnership business. After the death of one of the partners has dissolved the partnership, this general agency is changed by operation of law to a special agency. That agency is limited to selling the goods of the partnership, collecting the assets, paying the debts, and doing other acts which are necessary or proper to close and wind up the business. The surviving partner or partners have no right or authority after the dissolution to make any new contract to bind

4 C. & P. 108, 19 E. C. L. 430; Butchart v. Dresser, 10 Hare 453.

[63] Stephens v. Orman, 10 Fla. 9; Smith v. Dennison, 101 Ill. 531; Dunlap v. Limes, 49 Iowa 177; Mark v. Bowers, 4 Mart. (N. S.) (La.) 95; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869; Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673; Smith v. Winter, 8 L. J. Exch. 34, 4 M. & W. 454.

[64] "After the dissolution of the partnership, neither partner has authority, without special mandate so to do, to bind his former partners, either in the renewal of a partnership debt, the imposition of a new obligation on it, or to in any manner vary the form or character of the obligation already existing." Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255, and note. "It is the rule that each partner is the agent of the partnership, within the scope of the partnership business. * * * Such agency ceases upon dissolution of the copartnership, where notice thereof is given. * * * One member of a partnership after dissolution can not bind the partnership except so far as necessary for winding up its business. 1 Lindley on Partnership (2d ed.), p. 525, star pp. 218, 219. The rule is stated at star pages 218 and 219, 1 Lindley on Partnership, as follows: 'Other cases, which have been already referred to, clearly show that after the dissolution of an ordinary partnership, no one aware of the dissolution is entitled on any ground of implied agency to hold the members of the late firm responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation in Abel v. Sutton, that, if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all concerns of the partnership.'" Harris v. Zier, 43 Wash. 573, 86 Pac. 928. And compare People v. Devlin, 63 Misc. (N. Y.) 363, 118 N. Y. S. 478.

the partnership assets."[65] But as to third persons who have no notice of the dissolution, the powers of a partner to bind the firm remain the same as before dissolution.[66]

§ 594. **Notice of dissolution.**—One important subject in partnership law is the giving of notice of the dissolution of a partnership. Each partner is, as a general rule, the general agent for the firm as to all matters within the apparent scope of the firm business, the firm is liable to bona-fide third persons for such acts of one or more of the partners, and each partner is personally liable for all firm debts. This agency and liability continue as long as the partnership exists, and third parties have a right to consider it in existence until they have knowledge, actual or constructive, that the relation has ceased. Thus, "if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others."[67] Such notice is not always held necessary in a case

[65] Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415.

[66] See post § 594. "The rule is well settled that where a partnership is dissolved, or one or more of its members retires from the firm, without giving notice to the party with whom the partnership is dealing, the power of each member to bind the firm remains in full force, although, as between themselves, a dissolution or retirement is a revocation of the authority of each to act for the others." Easton v. Wostenholm, 137 Fed. 524.

[67] Lindley Partnership, *214; Uniform Partnership Act, § 35. See further Stewart v. Sonneborn, 51 Ala. 126; Holland v. Long, 57 Ga. 36; Strecker v. Conn, 90 Ind. 469; Price v. Towsey, 3 Litt. (Ky.) 423, 14 Am. Dec. 81; Hall v. Heck, 92 Mich. 458, 52 N. W. 749; Stoddard Mfg. Co. v. Krause, 27 Nebr. 83, 42 N. W. 913; Ketcham v. Clark, 6 Johns. (N. Y.) 144, 5 Am. Dec. 197; Shamburg v. Ruggles, 83 Pa. St. 148; Anderson v. Clayton, 39 Utah 343, 117 Pac. 41. See also Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Grady v. Robinson, 28 Ala. 289; Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Bredhoff v. Lepman, 181 Ill. App. 247; Iddings v. Pierson, 100 Ind. 418; Humphrey v. Mattox, 19 Ky. L. 1053, 42 S. W. 1100; Nevens v. Bulger, 93 Maine 502, 45 Atl. 503; Howe v. Thayer, 17 Pick. (Mass.) 91; Elkinton v. Booth, 143 Mass. 479, 10 N. E. 460; Westinghouse Electric & Mfg.

where a partnership is dissolved by operation of law, since it is said every one is bound to take notice of such dissolution because of its general notoriety, and this rule has been applied in case of death of a partner,[68] marriage of a feme sole partner,[69] bankruptcy,[70] or war.[71] The same rules as to partnership liability after dissolution to persons without notice apply when one partner has sold his interest and retired from the firm. It seems that where a person has actual knowledge, formal notice is unnecessary.[72] Conversely, a person who, when dealing with a partner, had no knowledge that a partnership had ever existed, is not entitled to notice of dissolution.[73] If no valid partnership

Co. v. Hubert (Mich.), 141 N. W. 600; Chamberlain v. Dow, 10 Mich. 319; Comfort v. Lynam, 67 Mo. App. 668; Deering v. Flanders, 49 N. H. 225; Union Nat. Bank v. Dean, 154 App. Div. 869, 139 N. Y. S. 835; Bynum v. Clark, 125 N. Car. 352, 34 S. E. 438; Easton v. Ellis, 1 Handy (Ohio) 70, 12 Ohio Dec. 32; Taylor v. Young, 3 Watts (Pa.) 339; Robinson v. Floyd, 159 Pa. St. 165, 28 Atl. 258, 33 Wkly. Notes Cas. (Pa.) 409; Anderson v. Clayton, 39 Utah, 343, 117 Pac. 41; Dickinson v. Dickinson, 25 Grat. (Va.) 321; Egholm v. Williams, 81 Wash. 609, 143 Pac. 152. And compare Price v. Succession of Mathews, 14 La. Ann. 11; Planters' Bank v. St. John, 1 Woods (U. S.) 585, Fed. Cas. No. 11208; Puritan Trust Co. v. Coffey, 180 Mass. 510, 62 N. E. 970; Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. 327; Griswold v. Waddington, 15 Johns. 57 (affd. 16 Johns. (N. Y.) 438). See Jeter v. Burgwyn, 113 N. Car. 157, 18 S. E. 113. See also as to necessity and nature of such notice to relieve a retiring partner from further liability, 3 Elliott Ev., § 2574.

[68] National Union Bank v. Hollingsworth, 135 N. Car. 556, 47 S. E. 618; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Price v. Mathews, 14 La. Ann. 11.

[69] The rule requiring notice to third parties has been held not to obtain where the dissolution has been worked by the marriage of a feme sole partner or by the death of one of the members of the firm. Little v. Hazlett, 197 Pa. 591, 47 Atl. 855.

[70] Uniform Partnership Act, § 35 b (2); Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. 327.

[71] Griswold v. Waddington, 16 Johns. (N. Y.) 438 (affg. 15 Johns. 57).

[72] Union Nat. Bank of Franklinville v. Dean, 154 App. Div. 869, 139 N. Y. S. 835; Miller v. Pfeiffer, 168 Ind. 219, 80 N. E. 409. See also Holtgreve v. Wintker, 85 Ill. 470; Ach v. Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. 893; Young v. Tibbitts, 32 Wis. 79.

[73] First International Bank of Portal v. Brown, 130 Minn. 210, 153 N. W. 522; Chamberlain v. Dow, 10 Mich. 319; Swigert v. Aspden, 52 Minn. 565, 54 N. W. 738; Wright v.

ever existed, notice of dissolution may be unnecessary.[74] A dormant partner need not give notice of dissolution of a firm or retirement from it in order to escape further liability,[75] unless his connection has become known, and then persons who have dealt with him are entitled to notice.[76]

§ 595. Uniform Partnership Act as to powers after dissolution and character of notice.—The law generally recognizes a difference in the character of notice required to be given to creditors of the firm or those who have had dealings with it and to the world at large. In this respect and as to powers after dissolution the Uniform Partnership Act provides: "After dissolution a partner can bind the partnership except as provided in paragraph (3), (a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution; (b) by any transaction which would bind the partnership if dissolution had not taken place provided the other party

Fonda, 44 Mo. App. 634; Bloch v. Price, 24 Mo. App. 14; Blanks v. Halfin (Tex. Civ. App.), 30 S. W. 941 (1895).

[74] Chamberlain v. Dow, 10 Mich. 319; Jeter v. Burgwyn, 113 N. Car. 157, 18 S. E. 113.

[75] Hornaday v. Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Oppenheimer v. Clemmons, 18 Fed. 886; Bigelow v. Elliot, 1 Cliff. (U. S.) 28, Fed. Cas. No. 1399; Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Nussbaumer v. Becker, 87 Ill. 281, 29 Am. Rep. 53; Pitkin v. Benfer, 50 Kans. 108, 31 Pac. 695, 34 Am. St. 110; Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838, 10 Ky. L. 570; Magill v. Merrie, 5 B. Mon. (Ky.) 168; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Elwards v. McFall, 5 La. Ann. 167; Lacaze v. Sejour, 10 Rob. (La.) 444; Grosvenor v. Loyd, 1 Metc. (Mass.) 19; Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Gorman v. Davis &c. Co., 118 N. Car. 370, 24 S. E. 770; Deford v. Reynolds, 36 Pa. St. 325; Vaccaro v. Toof, 9 Heisk. (Tenn.) 194; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858 (1898); Reynolds v. Bowley, L. R. 2 Q. B. 474; Heath v. Sansom, 4 B. & Ad. 172; Darling v. Magnan, 12 U. C. Q. B. 471; Carter v. Whalley, 1 B. & Ad. 11; Eng. Partnership Act (1890), § 36 (3).

[76] Park v. Wooten, 35 Ala. 242; Warren v. Ball, 37 Ill. 76; Cregler v. Durham, 9 Ind. 375; Elmira Iron & Steel Rolling Mill Co. v. Harris, 124 N. Y. 280, 26 N. E. 541, 3 Silvermail Ct. App. 351; Davis v. Allen, 3 N. Y. 168; Rowland v. Estes, 190 Pa. St. 111, 42 Atl. 528; Brown v. Foster, 41 S. Car. 118, 19 S. E. 299; Milmo Nat. Bank v. Bergstrom, 1 Tex. Civ. App. 151, 20 S. W. 836; Farrar v. Deflinne, 1 C. & K. 580.

to the transaction: (I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or (II) though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one), at which the partnership business was regularly carried on. (2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution: (a) unknown as a partner to the persons with whom the contract is made; and (b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it. (3) The partnership is in no case bound by any act of a partner after dissolution: (a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or, (b) where the partner has become bankrupt; or (c) where the partner has no authority to wind up partnership affairs, except by a transaction with one who (I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or (II) had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been published as provided in paragraph (1bII). (4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business."[77] This section of the act as originally drafted and as adopted in Wisconsin and Pennsylvania, was afterward rewritten, it being thought that, under the draft as written there was a remote possibility that a secret and inactive partner might be bound to a person who extended

[77] Uniform Partnership Act, § 35 as rewritten.

credit to the partnership after dissolution unless notice had been given or published and a bare possibility that if notice of dissolution had not been published a person who extended credit to the partnership after dissolution might hold all the partners, though he never heard of the partnership before dissolution.[78] By this act knowledge and notice are thus defined: A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith. A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice: (a) states the fact to such person, or (b) delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.[79] This act provides for actual notice only to those who have extended credit on the faith of the partnership and thus is in conflict with most of the holdings.

§ 596. Character of notice required and persons entitled to notice.—Under the general law:[80] "The familiar and well-settled rule is that a dissolution of the copartnership by act of the parties, whether a complete discontinuance of the concern, or the retirement of a single partner, or addition of a member, does not affect the outside world, unless proper notice is given;

[78] 29 Harv. L. Rev. 312. The following were the provisions of this section as to notice before rewriting: "If the partnership is not dissolved because it has become unlawful to carry on the business, a partner can not after dissolution bind the partnership to third persons by any act which is not necessary to wind up the partnership affairs or to complete transactions then unfinished, unless such third person, having had relations with the partnership by which a credit was extended upon the faith of the partnership, has had no knowledge or notice of the dissolution; or such third person, not having had business relations with the partnership by which a credit was extended to the partnership, has no knowledge or notice of the dissolution, and the fact of dissolution has not been advertised in a newspaper of general circulation of the place (or of each place if more than one) at which the partnership business was regularly carried on."

[79] Uniform Partnership Act, § 3.

[80] Pinney, J., in Thayer v. Goss, 91 Wis. 90, 64 N. W. 312 (1895).

that actual notice must be brought home to former customers, or those who are creditors by having dealt with it, but notice by publication is sufficient as to all others."[81] As to the actual notice or notice in fact required to be given to those formerly having dealings with the firm, it is immaterial by what means such notice is brought to the knowledge of the patrons or in what form it was given, so that such patrons get the information either directly or through some legitimate means of communication.[82] It is not sufficient to charge such a person with notice that he had means and opportunity to learn of the dissolution.[83] Mere publication in a newspaper of notice of dissolution is almost universally held insufficient as to parties who have had prior dealings with the firm,[84] even though the person sought

[81] Citing Bates Partnership, 606; 1 Lindley Partnership, 221. See also Neal v. Smith, 116 Fed. 20, 54 C. C. A. 226; Union Nat. Bank of Franklinville v. Dean, 154 App. Div. 869, 139 N. Y. S. 835; Lichenstein v. Murphree (Ala. App.), 62 So. 444; Gross v. Breckenridge Bank (Ky.), 90 S. W. 5, 4 L. R. A. (N. S.) 800; Nevens v. Bulger, 93 Maine 502, 45 Atl. 503; Vietor v. Spalding, 202 Mass. 234, 88 N. E. 846; Simmons Hdw. Co. v. Peck, 176 Mo. App. 86, 162 S. W. 1061.

[82] Miller v. Pfeiffer, 168 Ind. 219, 80 N. E. 409; Bowman v. Blanton, 141 Ky. 407, 132 S. W. 1041; Central Nat. Bank v. Frye, 148 Mass. 498, 20 N. E. 325; Holt v. Allenbrand, 52 Hun 217, 4 N. Y. S. 922, 22 N. Y. St. 925; Coddington v. Hunt, 6 Hill (N. Y.) 595; Laird v. Ivens, 45 Tex. 621. See also Kehoe v. Carville, 84 Iowa 415, 51 N. W. 166; Hall v. Jones, 56 Ala. 493; Hunt v. Colorado Milling &c. Co., 1 Colo. App. 120, 27 Pac. 873; Danforth v. Hertel, 3 Pennew. (Del.) 57, 49 Atl. 168; Holtgreve v. Wintker, 85 Ill. 470; Uhl v. Bingaman, 78 Ind. 365; Gross v. Breckenridge Bank (Ky.), 90 S. W. 5, 4 L. R. A. (N. S.) 800 and note; Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972; Gage v. Rogers, 51 Mo. App. 428; National Shoe &c. Bank v. Herz, 24 Hun (N. Y.) 260 (affd. 89 N. Y. 629); Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547; Davis v. Keyes, 38 N. Y. 94; Ellison v. Sexton, 105 N. Car. 356, 11 S. E. 180, 18 Am. St. 907; Irby v. Vining, 2 McCord L. (S. Car.) 379; Martin v. Walton, 1 McCord L. (S. Car.) 16; Williams v. Connor, 14 S. Car. 621; Prentiss v. Sinclair, 5 Vt. 149, 26 Am. Dec. 288; Young v. Tibbitts, 32 Wis. 79; Henry C. Werner Co. v. Calhoun, 55 W. Va. 246, 46 S. E. 1024.

[83] Gross v. Breckenridge Bank (Ky.), 90 S. W. 5, 4 L. R. A. (N. S.) 800.

[84] Bush v. W. A. McCarty Co., 127 Ga. 308, 56 S. E. 430, 9 Ann. Cas. 240 and note; Richards v. Butler, 65 Ga. 593; Page v. Brant, 18 Ill. 37; Denman v. Dosson, 19 La. Ann.

to be charged with notice is a subscriber to the paper in which the notice was published.[85] Nor is merely the mailing of notices to patrons, without proof of receipt, sufficient,[86] although if notices were placed in the mails properly addressed, a rebuttable presumption of fact arises that they were received in due course.[87] A change in the firm name as used in signs, letterheads and elsewhere, if it clearly indicates the retirement of a partner, may be notice of such fact.[88] Notice to an agent of one who has been a customer of the firm is usually sufficient[89] if within the scope

9; Skannel v. Taylor, 12 La. Ann. 773; Brashear v. Dwight, 2 La. Ann. 403; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Boyd v. McCann, 10 Md. 118; Sibley v. Parsons, 93 Mich. 538, 53 N. W. 786; Pope v. Risley, 23 Mo. 185; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; National Bank v. Norton, 1 Hill (N. Y.) 572; Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246; Commonwealth Bank v. Mudgett, 44 N. Y. 514 (affg. 45 Barb. (N. Y.) 663); Ellison v. Sexton, 105 N. Car. 356, 11 S. E. 180, 18 Am. St. 907; Scheiffelin v. Stevens, 60 N. Car. 106, 84 Am. Dec. 355; Robinson v. Floyd, 159 Pa. St. 165, 28 Atl. 258, 33 W. N. C. (Pa.) 409; Little v. Clark, 36 Pa. St. 114; Watkinson v. Bank of Pennsylvania, 4 Whart. (Pa.) 482, 34 Am. Dec. 521; White v. Murphy, 3 Rich. L. (S. Car.) 369; Haynes v. Carter, 12 Heisk. (Tenn.) 7, 27 Am. Rep. 747; Gilbough v. Stahl Bldg. Co., 16 Tex. Civ. App. 448, 41 S. W. 535; Amidown v. Osgood, 24 Vt. 278, 58 Am. Dec. 171; Henry C. Werner Co. v. Calhoun, 55 W. Va. 246, 46 S. E. 1024; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817.

[85] Treadwell v. Wells, 4 Cal. 260; Reilly v. Smith, 16 La. Ann. 31; Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389; Zollar v. Janvrin, 47 N. H. 324; Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524 (affd. 22 Wend. (N. Y.) 183); Hutchins v. Bank of Tennessee, 8 Humph. (Tenn.) 418; Wood v. Jefferies (Va.), 83 S. E. 1074.

[86] Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Kenney v. Altvater, 77 Pa. St. 34; Haynes v. Carter, 12 Heisk. (Tenn.) 7.

[87] Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246.

[88] Barfoot v. Goodall, 3 Campb. 147; American Linen Thread Co. v. Wortendyke, 24 N. Y. 550; Holt v. Allenbrand, 52 Hun (N. Y.) 217, 4 N. Y. S. 922; Kirby v. Hewitt, 26 Barb. (N. Y.) 607. See also Henry C. Werner Co. v. Calhoun, 55 W. Va. 246, 46 S. E. 1024.

[89] Page v. Brant, 18 Ill. 37; Hunt v. Colorado Milling &c. Co., 1 Colo. App. 120, 27 Pac. 873; Miller v. Pfeiffer, 168 Ind. 219, 80 N. E. 409; Ach v. Barnes, 107 Ky. 219, 53 S. W. 293, 21 Ky. L. 893; Tobias v. Wierck, 30 App. Div. 486, 52 N. Y. S. 312 (affg. 163 N. Y. 584, 57 N. E. 1126); Cox v. Pearce, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563; Bonnet v. Tips Hardware Co. (Tex. Civ. App.), 59 S. W. 59 (1900).

of his authority,[90] although not communicated by the agent to the principal.[91] The fact that one purchases from an entire stranger doing business for himself in the firm's place of business is sufficient notice of a sale to the stranger by the old partners.[92] General notoriety of the dissolution is evidence from which notice can be inferred,[93] but it depends on the circumstances as to whether sufficient notoriety is shown,[94] and it has been held insufficient where no published or personal notice was given.[95] The requirements of notice by publication if not regulated by statute, are complied with where the notice is published in a newspaper of general circulation in the locality where the partnership had its place of business in such a manner as fairly to inform the public of the dissolution.[96] Where notice has been properly given the mutual agency of each partner to bind the

[90] Neal v. Smith, 116 Fed. 20, 54 C. C. A. 226; Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40.

[91] Westinghouse Electric &c. Co. v. Hubert, 175 Mich. 568, 141 N. W. 600, Ann. Cas. 1915 A, 1099n; Straus v. Sparrow, 148 N. Car. 309, 62 S. E. 308; Jenkins Bros. Shoe Co. v. Renfrow, 151 N. Car. 323, 66 S. E. 212, 25 L. R. A. (N. S.) 231. Compare Mims v. Brook, 3 Ga. App. 247; United Dressed Beef Co. v. Burrell, 140 App. Div. 131, 124 N. Y. S. 1072.

[92] Clapp v. Upson, 12 Wis. 492.

[93] Mauldin v. Mobile Branch Bank, 2 Ala. 502; Brashear v. Dwight, 2 La. Ann. 403; Gage v. Rogers, 51 Mo. App. 428; Holdane v. Butterworth, 5 Bosw. (N. Y.) 1; Brown v. Foster, 41 S. Car. 118, 19 S. E. 299.

[94] Humes v. O'Bryan, 74 Ala. 64; Mauldin v. Mobile Branch Bank, 2 Ala. 502; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Roof v. Morrisson, 37 Ill. App. 37; Hammond v. Aiken, 3 Rich. Eq. (S. Car.) 119; Southwick v. Allen, 11 Vt. 75.

[95] Martin v. Searles, 28 Conn. 43; Lyon v. Johnson, 28 Conn. 1; Pitcher v. Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306.

[96] Mauldin v. Mobile Branch Bank, 2 Ala. 502; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Mowatt v. Howland, 3 Day (Conn.) 353; Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430, 9 Ann. Cas. 240n. See also Askew v. Silman, 95 Ga. 678, 22 S. E. 573; Shurlds v. Tilson, 2 McLean (U. S.) 458, Fed. Cas. No. 12, 827; Backus v. Taylor, 84 Ind. 503; Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Polk v. Oliver, 56 Miss. 566; Citizens' Nat. Bank v. Weston, 162 N. Y. 113, 56 N. E. 494 (revg. 19 App. Div. 627, 45 N. Y. S. 1136, and following Monongahela Valley Bank v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547); Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Watkinson v. Bank of Pennsylvania, 4 Whart. (Pa.) 482, 34 Am. Dec. 521; Galliott v. Planters' and Mechanics'

other by contracts is terminated.[97] That part of the rule as ordinarily stated and the texts upholding it which relate to actual notice to "customers" has been construed in a Georgia case which holds actual notice is necessary to creditors only, and contains otherwise a good exposition of the principles governing notice.[98] It was said: "the court, in certain instructions to the jury, which are complained of by the plaintiff in error, charged them, in effect, that if the plaintiff was a 'customer' of the firm, she would be entitled to actual notice of the dissolution. We think the court erred in so charging. In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known 'to creditors and to the world,' but it is not necessary that the notice should be actual or personal except as to creditors. Although it is often said in text-books and decisions that actual notice or knowledge of the dissolution must be brought home to former 'customers' of the firm, this language has reference only to creditors. * * * A customer, in the sense in which the term was used in this case,—that is to say, one whose dealings with the partnership have been confined to the purchase of its goods,— is entitled only to such notice as should be given to 'the world.'" Continuing, as to what notice should be given to the public at large, the court said: "As to the notice which should be given to 'the world,' no inflexible

Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; Simonds v. Strong, 24 Vt. 642; Prentiss v. Sinclair, 5 Vt. 149, 26 Am. Dec. 288; Young v. Tibbitts, 32 Wis. 79; Wright v. Pulham, 2 Chit. 121, 18 Rev. Rep. 784; Godfrey v. Turnbull, 1 Esp. 371; Gorham v. Thompson, 1 Peake 42, 3 Rev. Rep. 650.

[97] Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Goodspeed v. Wiard Plow Co., 45 Mich. 322, 7 N. W. 902; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; Davis v. Keyes, 38 N. Y. 94; Pineiro v. Gurney, 60 Hun 584, 15 N. Y. S. 217, 39 N. Y. St. 469; Brisban v. Boyd, 4 Paige Ch. (N. Y.) 17; Bain v. Wilson, 10 Ohio St. 14; Harris v. Zier, 43 Wash. 573, 86 Pac. 928; Jones v. Lloyd, L. R. 18 Eq. 265; Benham v. Gray, 5 C. B. 138; Willis v. Dyson, 1 Stark. 164, 2 E. C. L. 70. See also Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467; Filippini v. Stead, 4 Misc. 405, 23 N. Y. S. 1061.

[98] Askew v. Silman, 95 Ga. 678, 22 S. E. 573 (1895).

rule can be laid down. Publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made, is usually sufficient notice to the world.[99] An editorial notice, not signed by any member of the firm may be as effectual for this purpose as an advertisement purporting to issue by authority of the partners over their signature.[1] * * * Whether this is so or not is generally a question for the jury. * * * 'It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard,—as by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership,—are proper to be considered on the question of notice.'[2] It should be left to the jury to say whether the retired partner made a reasonable and bona-fide effort to acquaint the public with the fact of his retirement, and whether, on the other hand, the creditor, with the means and opportunity afforded him, knew, or ought to have known, of the fact. Even in the absence of any showing that notice of the dissolution was given, the fact that a considerable time elapsed between the dissolution and the contracting of the debt has been deemed sufficient to render the creditor chargeable with notice. * * * There is some question as to whether the jury may infer notice from general notoriety of the dissolution.[3] We think, however, that the evidence excluded by the court below in this case, as to the general notoriety of Askew's withdrawal from the partnership, although such notoriety may not of itself have been sufficient to charge the plaintiff with notice of the fact, ought to have been allowed to go to the jury, to

[99] Citing Ewing v. Trippe, 73 Ga. 776; Parsons' Partnership (4th ed.), § 317 and notes.

[1] Citing Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Young v. Tibbitts, 32 Wis. 79.

[2] Quoting from Lovejoy v. Spafford, 93 U. S. 430, 23 L. ed. 851.

[3] Citing Bates Partnership, § 622 and cases cited.

be considered by them for what it was worth, in connection with the other evidence bearing on the question of notice." Does the fact that a withdrawing partner allows the remaining partners to continue to use his name as part of the firm name of itself amount to a representation that he is still a partner therein?[4] In an English case decided in 1892, it was held that it does not amount to such a representation. In that case, the creditor suing had conducted no business with the old firm. The new firm continued to use the old firm name, which included the name of the withdrawing partner, but notified their bankers and their principal creditors of the dissolution. Kay, L. J., in his opinion, said: "Does the fact that John Frazer permitted his brother to carry on the business under the old firm name amount to the representation by him to the bank that he, John Frazer, was a partner in the firm? I think Newsome v. Coles, 2 Camp. 617, shows that it does not." This statement should, perhaps, be qualified somewhat, to conform to American law. It is undoubtedly true that such a use of a withdrawing partner's name would not be conclusive against him, yet it would be submitted to the jury, for what it is worth, coupled with other facts, and it would probably be necessary for the withdrawing partner to show that the creditor either knew or should have known that he was no longer connected with the firm, to make the withdrawal a defense. It is a question of fact for the jury whether a previous customer had notice of dissolution of a partnership,[5] and the burden of proving notice is on the partner seeking to escape liability.[6]

[4] In re Frazier, 2 Q. B. 633.

[5] Shurlds v. Tilson, 2 McLean (U. S.) 458, Fed. Cas. No. 12827; Mauldin v. Branch Bank, 2 Ala. 502; Danforth v. Hertel, 3 Pennewell (Del.) 57, 49 Atl. 168; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; Brown v. Foster, 41 S. Car. 118, 19 S. E. 299; Martin v. Walton, 1 McCord L. (S. Car.) 16; Henry C. Werner Co. v. Calhoun, 55 W. Va. 246, 46 S. E. 1024; Young v. Tibbitts, 32 Wis. 79. See also Roberts v. Spencer, 123 Mass. 397; Pitcher v. Barrows, 17 Pick (Mass.) 361, 28 Am. Dec. 306.

[6] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Birckhead v. De Forest, 120 Fed. 645, 57 C. C. A. 107; Moore v. Duckett, 91 Ga. 752, 17 S. E.

§ 597. Dissolution terminates contract of agency.—The dissolution of a partnership authorized to act as an agent revokes the agency.[7] This rule applies whether the dissolution is by death or otherwise and whatever the character of the agency.[8] The reason for the rule is that "it is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. * * * When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of the firm could do any act within the scope of the agency, the same as he could perform any other partnership act. By appointing a partnership firm it would be implied that the authority was joint and several. But, upon dissolution of the firm, such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act, nor agreed to be responsible for his acts; and the latter could incur no obligation against the deceased member or his representatives."[9] Merely a change in a firm's name without a change in personnel will not affect its authority as agent.[10] But

1037; Pursley v. Ramsey, 31 Ga. 403; Dixon Nat. Bank. v. Spielmann, 35 Ill. App. 184; Strecker v. Conn, 90 Ind. 469; Uhl v. Harvey, 78 Ind. 26; Duff v. Baker, 78 Iowa 642, 43 N. W. 463; Mitchum v. Bank of Kentucky, 9 Dana (Ky.) 166; Grinnan v. Baton Rouge Mills Co., 7 La. Ann. 638; Reading Braid Co. v. Stewart, 20 Misc. 86, 45 N. Y. S. 69 (affg. 19 Misc. 431, 43 N. Y. S. 1129); Ellison v. Sexton, 105 N. Car. 356, 11 S. E. 180, 18 Am. St. 907; Newcomet v. Brotzman, 69 Pa. St. 185; Southwick v. Allen, 11 Vt. 75.

[7] Schlau v. Enzenbacher, 265 Ill. 626, 107 N. E. 107, L. R. A. 1915 C, 576; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Davidson v. Provost, 35 Ill. App. 126; Meysenburg v. Littlefield, 135 Fed. 184; Rowe v. Rand, 111 Ind. 206, 12 N. E. 377; Johnson v. Wilcox, 25 Ind. 182; Holbert v. Keller, 161 Iowa 723, 142 N. W. 962; Angle v. Mississippi & M. R. Co., 9 Iowa 487; Wheaton v. Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399; Salisbury v. Brisbane, 61 N. Y. 617; Thomas v. Gwyn, 131 N. Car. 460, 42 S. E. 904; Larson v. Newman (N. Dak.), 121 N. W. 202, 23 L. R. A. (N. S.) 849 note; Robson v. Drummond, 2 Barn. & Ad. 303.

[8] See cases cited in preceding note.

[9] Martine v. International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529.

[10] Billingsley v. Dawson, 27 Iowa 210.

the authority of a surviving partner to act as agent may come from ratification.[11] One Arkansas case seems contrary to the general rule in holding that, where a client had contracted with a firm of attorneys for the services of one particular attorney at a stipulated fee, after his death the surviving partner could render the services and recover their value.[12]

§ 598. Powers of partner to administer firm affairs.— Where a partnership is dissolved by death the surviving partner or partners have the right, and are under the duty to wind up the firm business, and are entitled to exclusive possession of the firm assets.[13] If a partner or partners are bankrupt or insolvent, the insolvent partner or partners have the right to wind up the business.[14] In other cases, except where dissolution is caused by the wrongdoing of one partner, or there is an agree-

[11] Davidson v. Provost, 35 Ill. App. 126.

[12] Smith v. Hill, 13 Ark. 173.

[13] Campbell v. Floyd, 153 Pa. St. 84, 25 Atl. 1033; Wickliffe v. Eve, 17 How. (U. S.) 468, 15 L. ed. 163; McGorray v. O'Connor, 87 Fed. 586, 31 C. C. A. 114; Bischoffsheim v. Baltzer, 20 Fed. 890; Kenton Furnace R. &c. Co. v. McAlpin, 5 Fed. 737; Andrews v. Brown, 21 Ala. 437, 56 Am. Dec. 252; Adams v. Ward, 26 Ark. 135; Marlatt v. Scantland, 19 Ark. 443; McKay v. Joy, 70 Cal. 581, 11 Pac. 832; People v. Hill, 16 Cal. 113; Gray v. Palmer, 9 Cal. 616; Filley v. Phelps, 18 Conn. 294; Price v. Hicks, 14 Fla. 565; Territory v. Redding, 1 Fla. 242; Gardner v. Cumming, Ga. Dec. 1; Commercial Nat. Bank v. Proctor, 98 Ill. 558; Miller v. Jones, 39 Ill. 54; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Holland v. Fuller, 13 Ind. 195; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Pfeffer v. Steiner, 27 Mich. 537; Barry v. Briggs, 22 Mich. 201; Robertshaw v. Hanway, 52 Miss. 713; Hanway v. Robertshaw, 49 Miss. 758; Holman v. Nance, 84 Mo. 674; Judy v. St. Louis Ice Mfg. &c. Co., 60 Mo. App. 114; Loewenstein v. Loewenstein, 114 App. Div. 65, 99 N. Y. S. 730; Murray v. Mumford, 6 Cow. (N. Y.) 441; Enck v. Gerding, 67 Ohio St. 245, 65 N. E. 880; In re Shipe's Appeal, 114 Pa. St. 205, 6 Atl. 103; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Gant v. Reed, 24 Tex. 46, 76 Am. Dec. 94; In re Auerbach, 23 Utah 529, 65 Pac. 488; Stearns v. Houghton, 38 Vt. 583; Dyer v. Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89; Knox v. Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234.

[14] Bankruptcy Act, § 5; U. S. Bankr. L. (1898), § 5 (h); Eng. Partnership Act (1890), § 38. See also Vetterlein v. Barnes, 6 Fed. 693; Ex parte Owen, L. R. 13 Q. B. Div. 113; Luckie v. Forsyth, 3 J. & L. 388. Compare Hubbard v. Guild, 8 N. Y. Super. Ct. 662.

ment or order of court leaving to one partner the power of liquidating the firm assets each partner is entitled to take part in winding up firm affairs.[15] By the Uniform Partnership Act, "unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: provided, however, that any partner, his legal representatives or his assigns, upon cause shown, may obtain winding up by the court."[16] It is provided also that the partnership is in no case bound by acts of a bankrupt partner.[17] It is not uncommon for partners to provide by agreement that one partner shall take the firm assets as owner and that he shall assume firm debts, and such arrangement is binding between the partners,[18] though not on third parties who have not consented to such arrangement.[19]

§ 599. Some general powers and disqualifications of partner after dissolution.—A partner after dissolution may use the firm name if not in such a manner as to render other partners liable,[20] but he has no implied power to use it so as to bind other partners.[21] After dissolution, partners have the power,[22]

[15] Granger v. McGilvra, 24 Ill. 152; Skannel v. Taylor, 12 La. Ann. 773; Davis v. Briggs, 39 Maine 304; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Hilton v. Vanderbilt, 82 N. Y. 591; Ruffner v. Hewitt, 7 W. Va. 585; Eng. Partnership Act. (1890), § 39.

[16] Uniform Partnership Act, § 37.

[17] Uniform Partnership Act, § 35 (2).

[18] Mafflyn v. Hathaway, 106 Mass. 414; Young v. Clute, 12 Nev. 31.

[19] Bedford v. Deakin, 2 B. & Ald. 210, 2 Stark. 178, 3 E. C. L. 366; Lacy v. McNeale, 4 D. & R. 7, 16 E. C. L. 185; Featherstone v. Hunt, 2 D. & R. 233, 1 B. & C. 113, 1 L. J. K. B. (O. S.) 49, 8 E. C. L. 49; Isbester v. Ray, 26 Can. Sup. Ct. 79 [affg. 22 Ont. App. 12 (revg. 24 Ont. 497)]; Bresse v. Griffith, 24 Ont. 492.

[20] Cronly v. Bank of Kentucky, 18 B. Mon. (Ky.) 405; First Commercial Bank v. Talbert, 103 Mich. 625, 61 N. W. 888, 50 Am. St. 385; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535.

[21] Holbrook v. Nesbitt, 163 Mass. 120, 39 N. E. 794; Burchell v. Wilde (1900), 1 Ch. 551, 69 L. J. Ch. 314, 82 L. T. Rep. (N. S.) 576; Levy v. Walker, 10 Ch. D. 436; Chappell v. Griffith, 50 J. P. 86, 53 L. T. (N. S.) 459; Aikins v. Piper, 15 Grant Ch. (U. C.) 581.

[22] Dew v. Pearson, 73 Wash. 602, 132 Pac. 412; Sandberg v. Scougale,

and are under the duty to perform existing firm contracts.[23] Third persons are not relieved from liability on their existing contracts with the firm,[24] unless it is expressly so agreed, or may be implied by law.[25] It has been seen that the agency of a partnership is terminated by dissolution.[26] A continuing guaranty to a firm of an account of a customer or patron is terminated by change in the membership of such firm, except as to goods sold, or credits extended, before dissolution.[27] Confession of

75 Wash. 313, 134 Pac. 1051; Davis v. Sowell, 77 Ala. 262; Western Stage Co. v. Walker, 2 Iowa 504, 65 Am. Dec. 789; White v. Kearney, 2 La. Ann. 639; Feige v. Babcock, 111 Mich. 538, 70 N. W. 7; Holmes v. Shands, 27 Miss. 40; Bryant v. Hawkins, 47 Mo. 410; Dean v. McFaul, 23 Mo. 76; Powell v. Roberts, 116 Mo. App. 629, 92 S. W. 752; French v. Griffin, 104 N. Car. 141, 10 S. E. 166; Robertson v. Wood, 10 Kulp. (Pa.) 76; Ault v. Goodrich, 4 Russ. 430, 28 Rev. Rep. 151; Crawshay v. Collins, 2 Russ. 325, 26 Rev. Rep. 83; Eng. Partnership Act (1890), §§ 38, 39. See also Bryant v. Hawkins, 47 Mo. 410.

[23] Fail v. McRee, 36 Ala. 61; Whiting v. Farrand, 1 Conn. 60; Jacksonville &c R. &c. Co. v. Warriner, 35 Fla. 197, 16 So. 898; Arnold v. Hart, 176 Ill. 442, 52 N. E. 936 (affg. 75 Ill. App. 165); Dickson v. Indianapolis Cotton Mfg. Co., 63 Ind. 9; Ayres v. Chicago &c. R. Co., 52 Iowa 478, 3 N. W. 522; Mutual Bldg. &c. Assoc. v. Fidelity &c. Co. of Maryland, 50 La. Ann. 291, 23 So. 405; Nickerson v. Russell, 172 Mass. 584, 53 N. E. 141; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. 375, 32 L. R. A. 620; Booker v. Kirkpatrick, 26 Grat. (Va.) 145; Anderson v. Weston, 6 Bing. (N. Cas.) 296, 4 Jur. 105, 9 L. J. P. C. 194.

[24] Dew v. Pearson, 73 Wash. 602, 132 Pac. 412; Roehm v. Horst, 91 Fed. 345, 33 C. C. A. 550 (affd. 178 U. S. I., 20 Sup. Ct. 780, 44 L. ed. 953); Smith v. Hill, 13 Ark. 173; Turk v. Nicholson, 30 Iowa 407; Campbellsville Lumber Co. v. Bradlee, 96 Ky. 494, 29 S. W. 313, 16 Ky. L. 572; Palmer v. Sawyer, 114 Mass. 1; Swobe v. New Omaha Thomson-Houston Electric Light Co., 39 Nebr. 586, 58 N. W. 181; McCraney v. McCool, 19 Ont. 470 (affd. in 18 Ont. App. 217).

[25] Roberts v. Kelsey, 38 Mich. 602; Wheaton v. Cadillac Automobile Co., 143 Mich. 21, 106 N. W. 399; Hurlbut v. Post, 14 N. Y. Super. Ct. 28; Holmes v. Caldwell, 8 Rich. L. (S. Car.) 247; Fulton v. Thompson, 18 Tex. 278; Tasker v. Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207; Dougall v. Ockerman, 9 U. C. Q. B. 354.

[26] Holbert v. Keller, 161 Iowa 723, 142 N. W. 962. See ante §§ 592, 593.

[27] Lyon v. Plum, 75 N. J. L. 883, 69 Atl. 209, 14 L. R. A. (N. S.) 1231 note, 127 Am. St. 858. See generally the following cases: Grant v. Naylor, 4 Cranch U. S. 224, 2 L. ed. 603; Crane Co. v. Specht, 39 Nebr. 123, 57 N. W. 1015, 42 Am. St. 562; People v. Backus, 117 N. Y. 196, 22

judgment for a firm debt by one partner after dissolution will not bind other partners.[28] Nor after dissolution except by death can a partner make a valid assignment for benefit of creditors.[29] So far as within the scope of his authority, the members of a partnership are liable for wrongful acts of a partner after dissolution,[30] nor are they relieved from liability for wrongful acts of partners before dissolution, for which they would have been liable had the firm continued.[31]

§ 600. Admissions of partner after dissolution.—Dissolution likewise seems to preclude a member of the late firm from making a new promise to stop the running of the statute of limitations,[32] and from binding his copartners by an admission of

N. E. 759; City Nat. Bank v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513; Penoyer v. Watson, 16 Johns. (N. Y.) 100; Taylor v. Wetmore, 10 Ohio, 490; Smith v. Montgomery, 3 Tex. 199; Myers v. Edge, 7 T. R. 250; Strange v. Lee, 3 East 484; Pemberton v. Oakes, 4 Russ. 154; Cosgrave Brewing &c. Co. v. Starrs, 5 Ont. Rep. 189; Dry v. Davy, 10 Ad. & El. 30, 3 Jur. 315.

[28] Mitchel v. Rich, 1 Ala. 228; Conery v. Rotchford, 30 La. Ann. 692; Morgan v. Richardson, 16 Mo. 409, 57 Am. Dec. 235; Lambert v. Converse, 22 How. Pr. (N. Y.) 265; Mair v. Beck (Pa.), 2 Atl. 218, 1 Sad. 360.

[29] Deckert v. Filbert, 3 Watts & S. (Pa.) 454; Kellogg v. Cayce, 84 Tex. 213, 19 S. W. 388.

[30] Smith v. Jameson, 1 Peake 213, 5 T. R. 601. See also Powell v. Roberts, 116 Mo. App. 629, 92 S. W. 752.

[31] In re Hughes, 15 Quebec Super. Ct. 225; Roberts v. Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Brown v. Higginbotham. 5 Leigh (Va.) 583, 27 Am. Dec. 618.

[32] See ante § 467. Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Mayberry v. Willoughby, 5 Nebr. 368, 25 Am. Rep. 491; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656n; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Bush v. Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Reppert v. Colvin, 48 Pa. St. 248; Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Davis v. Poland, 92 Va. 225, 23 S. E. 292. Compare Forbes v. Garfield, 32 Hun (N. Y.) 389; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760. Contra: Beardsley v. Hall, 36 Conn. 270, 4 Am. Rep. 74; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Vinal v. Burrill, 16 Pick. (Mass.) 401; Merritt v. Day, 38 N. J. L. 32, 20 Am. Rep. 362; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Wheelock v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

liability.[33] On this latter point, however, the cases are not in harmony. Some of them hold that admissions of a partner after dissolution are entirely incompetent against the other partners, mutual agency having ceased.[34] The other rule is that admissions made by one partner after dissolution in winding up the business concerning an engagement made before dissolution, are binding on the copartners, the theory being that the original joint interest in the obligations before dissolution is a sufficient foundation to render the admissions of one of those jointly bound competent against the others so bound,[35] but even under this rule, the fact of partnership must first be proved.[36] The Uniform Part-

[33] See ante § 468. As a general rule the power of a partner to make admissions binding upon the firm ceases after dissolution. Burdett v. Greer, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019n, 129 Am. St. 1014. See further Barringer v. Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; Burns v. McKenzie, 23 Cal. 101; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Herrick v. Conant, 4 La. Ann. 276; Clarke v. Jones, 1 Rob. (La.) 78; Atwood v. Gillett, 2 Doug. (Mich.) 206; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Flowers v. Helm, 29 Mo. 324; Pope v. Risley, 23 Mo. 185; Brady's Admr. v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Vergennes Bank v. Cameron, 7 Barb. (N. Y.) 143; Hart v. Woodruff, 24 Hun (N. Y.) 510; Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Hackley v. Patrick, 3 Johns. (N. Y.) 536; Smith v. Ludlow, 6 Johns. (N. Y.) 267; Hopkins v. Banks. 7 Cow. (N. Y.) 650; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Brisban v. Boyd, 4 Paige Ch. (N. Y.) 17; Hart v. Woodruff, 24 Hun (N. Y.) 510; Mercer v. Sayre, Anth. N. P. (N. Y.) 119 (2d ed. 162); Meggett v. Finney, 4 Strob. (S. Car.) 220; Chardon v. Oliphant, 3 Brev. (S. Car.) 183, 6 Am. Dec. 572; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Berryhill's Exrs. v. McKee's Exrs., 1 Humph. (Tenn.) 31; Bispham v. Patterson, 2 McLean (U. S.) 87, Fed. Cas. No. 1441. And compare Wood v. Braddick, 1 Taunt. 104; Schoneman v. Fegley, 7 Pa. St. 433. See also 3 Elliott Ev., § 2573.

[34] Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Hart v. Woodruff, 24 Hun (N. Y.) 510; Pringle v. Leverich, 97 N. Y. 181, 49 Am. Rep. 522; Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132; Wallis v. Randall, 81 N. Y. 164.

[35] Wood v. Braddick, 1 Taunt. 104; Bispham v. Patterson, 2 McLean (U. S.) 87, Fed. Cas. No. 1441; Parker v. Merril, 6 Greenl. (Maine) 41.

[36] Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Allcott v. Strong, 9 Cush. (Mass.) 323; Pennoyer v. David, 8 Mich. 407; Willis v. Hill, 2 Dev. & B. L. (N. Car.) 231.

nership Act provides that "an admission or representation made by any partner concerning partnership affairs within his authority as conferred by this act is evidence against the partnership,"[37] and since the right to wind up firm affairs was given by this act it seems that the undoubted intention was to make admissions of a partner engaged in winding up firm business after dissolution, competent against the other members of the firm.

§ 601. Power over firm property.—Partners on dissolution, save for death, may, by agreement, give control of the firm property to one member.[38] Whenever a partner's interest is transferred voluntarily, or at execution sale, or to a trustee in bankruptcy, the remaining partners have the control and disposition of the firm property.[39] In cases of dissolution for other causes each partner who has not wrongfully caused dissolution has an equal right to the control and disposition of firm property, but only for the purpose of winding up the business and distributing the proceeds.[40] Such powers may be modified by agree-

[37] Uniform Partnership Act, § 11.

[38] Gaisell v. Johnston, 68 Wash. 470, 123 Pac. 783; Johnston v. Gaisell, 68 Wash. 700, 123 Pac. 784; Stanton v. Lewis, 26 Conn. 444; Renfrow v. Pearce, 68 Ill. 125; Baldwin v. Johnson, 1 N. J. Eq. 441; Smith v. Proskey, 177 N. Y. 526, 69 N. E. 1131 (revg. 82 App. Div. 19, 81 N. Y. S. 424, and affg. 39 Misc. 385, 79 N. Y. S. 851); Smith v. Underhill, 64 Hun 639, 19 N. Y. S. 249, 47 N. Y. St. 23; Weston v. Watts, 55 Hun 608, 8 N. Y. S. 633, 29 N. Y. St. 289 (affd. 121 N. Y. 678, 24 N. E. 1095); Jones v. Jones, 10 Ohio Cir. Dec. 71, 18 Ohio Cir. Ct. 260; Nixon v. Champion, 4 Leg. Gaz. (Pa.) 73, 29 Leg. Int. 76; Mygatt v. McClure, 3 Head (Tenn.) 495; Hetterman Bros. Co. v. Young, Ch. App. (Tenn.), 52 S. W. 532.

[39] Reece v. Hoyt, 4 Ind. 169; Chase v. Scott, 33 Iowa 309; Macdonald v. Trojan Button-Fastener Co., 56 Hun 648, 10 N. Y. S. 91, 31 N. Y. St. 374; Fraser v. Kershaw, 2 Jur. (N. S.) 880.

[40] Uniform Partnership Act, § 37; Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Bach v. State Ins. Co., 64 Iowa 595, 21 N. W. 99; Hogendobler v. Lyon, 12 Kans. 276; Claiborne v. Creditors, 18 La. 501; Phillips v. Reeder, 18 N. J. Eq. 95; Bennett v. Buchan, 61 N. Y. 222 (affg. 53 Barb. (N. Y.) 578, 5 Abb. Pr. (N. S.) 412); Castle v. Marks, 50 App. Div. 320, 63 N. Y. S. 1039; Kennett v. Hopkins, 20 Misc. 259, 45 N. Y. S. 797 (affd. 40 App. Div. 367, 57 N. Y. S. 961); Van Doren v. Horton, 19 Hun (N. Y.) 7; Noonan v. McNab, 30 Wis. 277; Fisher v. McPhee, 28 Nova Scotia 523; Murphy

ment[41] and must not be exercised so as to prejudice the rights of creditors or of other partners,[42] but in a manner to conserve the interests of all the partners.[43] If a partner after dissolution retains the proceeds from the sale of firm property for more than a reasonable time he may be chargeable with interest,[44] and if one partner carries on the business after dissolution he must account for profits to his copartners.[45] A partner after dissolution can not transfer firm property to pay his individual debts unless firm creditors are paid and the copartners have consented.[46] A sale or transfer of firm property to raise money to pay debts is valid,[47] such as assigning a book account for full value.[48] But no partner, after dissolution, any more than at any other time, can assign the firm property generally for the benefit of creditors.[50] Partners have no right to partition of firm real estate so long as firm debts are not paid.[51] One partner may convey the equitable title to firm realty if necessary to pay firm debts,

v. Yeomans, 29 U. C. C. P. 421. Compare Hockin v. Whellams, 6 Manitoba 521.

[41] Phillips v. Reeder, 18 N. J. Eq. 95.

[42] Claiborne v. Creditors, 18 La. 501.

[43] Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072; Breyfogle v. Bowman, 157 Ky. 62, 162 S. W. 787.

[44] Randolph v. Inman, 172 Ill. 575, 50 N. E. 104; Buckley v. Kelly, 70 Conn. 411, 39 Atl. 601.

[45] Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484.

[46] Cannon v. Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. 38; McLanahan v. Ellery, 3 Mason (U. S.) 269, Fed. Cas. No. 8869; Curry v. Burnett, 36 Ind. 102; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Treadwell v. Williams, 9 Bosw. (N. Y.) 649; Corwin v. Suydam, 24 Ohio St. 209; Crossman v. Shears, 3 Ont. App. 583.

[47] Bach v. State Ins. Co., 64 Iowa 595, 21 N. W. 99; Milliken v. Loring, 37 Maine 408; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Thursby v. Lidgerwood, 69 N. Y. 198; Robbins v. Fuller, 24 N. Y. 570.

[48] Fourth Nat. Bank v. Flach, 2 Ohio S. & C. P. Dec. 443.

[50] Stanton v. Lewis, 26 Conn. 444; Kellar v. Self, 5 Tex. Civ. App. 393, 24 S. W. 578; Paton v. Wright, 15 How. Pr. (N. Y.) 481; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236.

[51] Moran v. McInerney, 129 Cal. 29, 61 Pac. 575, 948; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Pennybacker v. Leary, 65 Iowa 220, 21 N. W. 575; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Mendenhall v. Benbow, 84 N. Car. 646; Haeberly's Appeal, 191 Pa. St. 239, 43 Atl. 207; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

since firm realty is considered as personalty for the purpose of paying debts.[52]

§ 602. Power to collect, pay, or compromise firm debt.— It is each partner's right and duty to collect firm debts after dissolution, and give receipts for them.[53] By agreement this right and duty may be conferred on one partner only.[54] Such partner must use due diligence and must account for the moneys taken in.[55] He has no power to deduct individual debts of his own from firm debts,[56] nor to take in satisfaction notes payable to himself,[57] or property other than money,[58] or subject the other partners to a new obligation in their settlement.[59] Each partner has the same right and duty to pay firm debts which he has

[52] Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Dupuy v. Leavenworth, 17 Cal. 262; Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932; McKee v. Covalt, 71 Kans. 772, 81 Pac. 475; State v. Neal, 29 Wash. 391, 69 Pac. 1103; Myers v. Myers, 61 L. T. (N. S.) 757; Langlois v. Dubray, 17 Quebec Super. Ct. 328.

[53] Heartt v. Walsh, 75 Ill. 200; Major v. Hawkes, 12 Ill. 298; Gordon v. Freeman, 11 Ill. 14; Hansen v. Miller, 44 Ill. App. 550 (affd. 145 Ill. 538, 32 N. E. 548); Wilder v. Morris, 7 Bush (Ky.) 420; Gannett v. Cunningham, 34 Maine 56; Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376; Robbins v. Fuller, 24 N. Y. 570; Huntington v. Potter, 32 Barb. (N. Y.) 300; Ward v. Barber, 1 E. D. Smith (N. Y.) 423; McRae v. McKenzie, 22 N. Car. 232; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Lamb v. Saltus, 3 Brev. (S. Car.) 130; Ayer v. Ayer, 41 Vt. 346.

[54] Hawn v. Seventy-Six Land &c. Co., 74 Cal. 418, 16 Pac. 196; McDowell v. North, 24 Ind. App. 435, 55 N. E. 789; Manning v. Brickell, 3 N. Car. 133; Esterly v. Bressler, 15 Pa. Super. Ct. 455.

[55] Metcalf v. Fouts, 27 Ill. 110; Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; Chretien v. Giron, 115 La. 24, 38 So. 881; Phelan v. Hutchison, 62 N. Car. 116, 93 Am. Dec. 602; Kennett v. Hopkins, 20 Misc. 259, 45 N. Y. S. 797 (affd. 40 App. Div. 367, 57 N. Y. S. 961); Burstall v. Baptist, 21 Wkly. Rep. 485.

[56] Brunson v. McLendon, 98 Ala. 568, 13 So. 523; Cannon v. Lindsey, 85 Aa. 198, 3 So. 676, 7 Am. St. 38; Lees v. Laforest, 14 Beav. 250, 51 Eng. Reprint 283; Pritchard v. Draper, 1 Russ. & M. 191.

[57] Granger v. McGilvra, 24 Ill. 152; Lemiette v. Starr, 66 Mich. 539, 33 N. W. 832.

[58] Kirk v. Hiatt, 2 Ind. 322; Kutz v. Naugle, 7 Pa. Super. Ct. 179.

[59] Rootes v. Wellford, 4 Munf. (Va.) 215, 6 Am. Dec. 510; Niemann v. Niemann, 43 Ch. D. 198.

to collect them.[60] But where one partner has assumed the firm debts, the creditors have not lost their right to enforce their claims against the other partners.[61] If by agreement one partner is given power to liquidate firm affairs, none of the others have power to compromise firm debts.[62] Nor has a partner who has surrendered to the other members of a partnership his interest in a partnership claim, authorization to settle it.[63] Unless one partner is given such power, each has equal power in the collection or payment of debts and many honest compromises or releases by a partner after dissolution have been sustained by the courts.[64]

§ 603. **Power to make new contracts.**—The rule is universal that a partner has no implied authority to bind his copartners to new contracts after dissolution.[65] Nor does a partner who by agreement is given the power to liquidate firm af-

[60] Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31 (affg. 66 Ill. App. 282); Woody v. Haworth, 24 Ind. App. 634, 57 N. E. 272; Hanks v. Flynn, 108 Iowa 165, 78 N. W. 839; Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611.

[61] See ante § 557 et seq., on change of membership where subject of assumption was more fully discussed; Fowler v. Coker, 107 Ga. 817, 33 S. E. 661; Weirick v. Graves, 73 Ill. App. 266; McLoughlin v. Bieber, 41 App. Div. 561, 58 N. Y. S. 790; Rowand v. Fraser, 1 Rich. Law (S. Car.) 325.

[62] Roberts v. Strang, 38 Ala. 566, 82 Am. Dec. 729; Hodge v. Whitall, 15 La. 503; Chace v. Higgins, 1 Thomp. & C. (N. Y.) 229; Burhans v. Burhans, 48 Hun 619, 1 N. Y. S. 37, 16 N. Y. St. 520; Gram v. Cadwell, 5 Cow. (N. Y.) 489.

[63] Scott v. Atlanta Wood & Iron Novelty Works, 12 Ga. App. 216, 76 S. E. 1082.

[64] Scott v. Atlanta Wood & Iron Novelty Works, 12 Ga. App. 216, 76 S. E. 1082; Nickels v. Mooring, 16 Fla. 76; Gordon v. Albert, 168 Mass. 150, 46 N. E. 423; Bass v. Taylor, 34 Miss. 342; Napier v. McLeod, 9 Wend. (N. Y.) 120; Sims v. Smith, 11 Rich. L. (S. Car.) 565; Union Bank v. Hall, Harp. (S. Car.) 245; Weir Plow Co. v. Evans (Tex. Civ. App.), 24 S. W. 38 (1893); Thrall v. Seward, 37 Vt. 573; Brayley v. Goff, 40 Iowa 76.

[65] Louisiana Purchase Exposition Co. v. Mueller (Mo. App.), 155 S. W. 881; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Lockwood v. Comstock, 4 McLean (U. S.) 383, Fed. Cas. No. 8449; Wilson v. Torbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; First International Bank of Portal v. Brown, 130 Minn. 210, 153 N. W. 522; Grafton v. Paine, 7 App. Cas. (D. C.) 255 (appeal dismissed 168 U. S. 704, 18 S. Ct. 942, 42 L. ed. 1212); McGee v. Potts, 87 Ga. 615, 13

fairs have authority to create new liabilities,[66] except in a few jurisdictions.[67] In the course of settling firm affairs, however, some obligations may naturally arise out of dealings previous to the dissolution by which the partners will be bound, such as liability to a surety, on an appeal bond for appeal from a judgment against the firm, who was compelled to pay the judgment,[68] or liability for an excess of money paid to one partner on a firm debt,[69] or liability for compensation for driving logs intermingled with another's logs,[70] or for compensation to an accountant who was engaged by one partner to audit the firm books.[71] One partner may do what is necessary to complete

S. E. 746; Milwaukee Harvester Co. v. Newell, 65 Ill. App. 612; Hayden v. Cretcher, 75 Ind. 108; Gard v. Clark, 29 Iowa 189; Montague v. Reakert, 6 Bush (Ky.) 393; Bacon v. Hutchings, 5 Bush (Ky.) 595; Richard v. Monton, 109 La. 465, 33 So. 563; Clarke v. Jones, 1 Rob. (La.) 78; Lane v. Tyler, 49 Maine 252; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Boyle v. Musser, 77 Minn. 153, 79 N. W. 664; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; Bennett v. Buchan, 61 N. Y. 222 (affg. 53 Barb. (N. Y.) 578, 5 Abb. Pr. (N. S.) 412); Payne v. Smith, 28 Hun (N. Y.) 104; Kirby v. Hewitt, 26 Barb. (N. Y.) 607; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Roots v. Kilbreth, 10 Ohio Dec. 20, 18 Wkly. L. Bul. 58; Beaumont v. Sharpless, 45 Pa. Super. Ct. 575; Atlantic Refining Co. v. Mengel, 6 Pa. Dist. 223; Veale v. Hassan, 3 McCord (S. Car.) 278; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Williams v. Whitmore, 9 Lea (Tenn.) 262; Jones' Case, 1 Overt. (Tenn.) 455; Lee v. Stowe, 57 Tex. 444; Haddock v. Crocheron, 32 Tex. 276, 5 Am. Rep. 244; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858 (1898); Commercial Nat. Bank of Salt Lake City v. Brinton (Utah), 145 Pac. 42; Pratt v. Page, 32 Vt. 13; Harris v. Zier, 43 Wash. 573, 86 Pac. 928; McDonald v. McKeen, 28 Nova Scotia 329.

[66] Chase v. Kendall, 6 Ind. 304; Hamilton v. Seaman, 1 Ind. 185, Smith 129; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Hurst v. Hill, 8 Md. 399, 63 Am. Dec. 705; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554; Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271; Speake v. White, 14 Tex. 364; Woodson v. Wood, 84 Va. 478, 5 S. E. 277.

[67] Prudhomme v. Henry, 5 La. Ann. 700; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; Brown v. Clark, 14 Pa. St. 469; In re Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574.

[68] Gard v. Clark, 29 Iowa 189.

[69] Williams v. Whitmore, 9 Lea (Tenn.) 262.

[70] Boyle v. Musser, 77 Minn. 153, 79 N. W. 664.

[71] Lichenstein v. Murphree (Ala. App.), 62 So. 444.

transactions and contracts unfinished at the time of dissolution.[72] He may charge the partners for expenses reasonably incurred in preserving firm property.[73]

§ 604. **Powers as to negotiable paper.**—Following notice of dissolution a partner can not, in general, in the absence of any element of ratification or estoppel, issue negotiable paper, even in settlement of a debt of the firm,[74] even of a renewal char-

[72] Page v. Wolcott, 15 Gray (Mass.) 536; Asbestos Mfg. & Supply Co. v. Lennig-Rapple Engineering Co., 26 Cal. App. 177, 146 Pac. 188; Western Stage Co. v. Walker, 2 Iowa 504, 65 Am. Dec. 789; Rust v. Chisolm, 57 Md. 376; Holmes v. Shands, 27 Miss. 40; Armstrong v. Henley, 182 Mo. App. 320, 170 S. W. 402.

[73] Conrad v. Buck, 21 W. Va. 396.

[74] Lockwood v. Comstock, 4 McLean (U. S.) 383, Fed. Cas. No. 8449; Draper v. Bissell, 3 McLean (U. S.) 275, Fed. Cas. No. 4068; Fraser v. Wolcott, 4 McLean (U. S.) 365, Fed. Cas. No. 5065. See Cunningham v. Bragg, 37 Ala. 436; Burr v. Williams, 20 Ark. 171; Curry v. White, 51 Cal. 530; New Haven County Bank v. Mitchell, 15 Conn. 206; First Nat. Bank v. Ells, 68 Ga. 192; Humphries v. Chastain, 5 Ga. 166, 48 Am. Dec. 247; Bank of Montreal v. Page, 98 Ill. 109; Floyd v. Miller, 61 Ind. 224; Van Valkenburg v. Bradley, 14 Iowa 108; Linn v. Valz, 11 Ky. L. 846; Mullins v. Simpkinson, 10 Ky. L. (abstract) 280; Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255n; Commercial Bank v. Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; Dodd v. Bishop, 30 La. Ann. 1178; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Ecker v. First Nat. Bank, 59 Md. 291; Hurst v. Hill, 8 Md. 399, 63 Am. Dec. 705; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Bryant v. Lord, 19 Minn. 396; Maxey v. Strong, 53 Miss. 280; Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471n; Fellows v. Wyman, 33 N. H. 351; Farmers' &c. Bank v. Green, 30 N. J. L. 316; Lusk v. Smith, 8 Barb. (N. Y.) 570, 4 How. Pr. 418; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Mitchell v. Ostrom, 2 Hill (N. Y.) 520; National Bank v. Norton, 1 Hill (N. Y.) 572; Bristol v. Sprague, 8 Wend. (N. Y.) 423; Payne v. Slate, 39 Barb. (N. Y.) 634 (affd. 29 N. Y. 146); Gardner v. Conn, 34 Ohio St. 187; McCowin v. Cubbison, 72 Pa. St. 358; Galliott v. Planters' & Mechanics' Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; Heckheimer v. Allen, 89 S. Car. 452, 71 S. E. 1033; Isler v. Baker, 6 Humph. (Tenn.) 85; Funck v. Heintze (Tex. Civ. App.), 23 S. W. 417; Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483. And compare Jones v. Thorn, 2 Mart. (N. S.) (La.) 463; Temple v. Seaver, 11 Cush. (Mass.) 314; Gould v. Horner, 12 Barb. (N. Y.) 601; Robinson v. Taylor, 4 Pa. St. 242; Myers v. Huggins, 1 Strob. (S.

acter,[75] in the firm name so as to bind his former associates, nor can he bind them by indorsing such paper.[76] If after the dissolution of a firm by the retirement of one of the partners, a bill or note is re-executed in the firm name by the remaining partner or partners in the usual course of business, the retiring partner can not set up in defense to an action thereon by a holder for value and without notice, the fact that the firm has been dissolved, since the authority and obligation of the partners continue until legal notice of the dissolution has been given.[77] "When a partnership has once existed, the presumption is that it still exists until its dissolution is made known, and, until this is done, the public have the right to presume on its continued existence, and when a former member contracts a debt in its

Car.) 473; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126. See also 3 Elliott Ev., § 2572.

[75] Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255n; Lumberman's Bank v. Pratt, 51 Maine 563; Moore v. Lackman, 52 Mo. 323; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Foltz v. Pourie, 2 Desaus. (S. Car.) 40 Brown v. Chancellor, 61 Texas 437; Lange v. Kennedy, 20 Wis. 279.

[76] Dean v. Savage, 28 Conn. 359; Bogereau v. Gueringer, 14 La. Ann. 478; Carr v. Woods, 11 Rob. (La.) 95; Rudy v. Harding, 6 Rob. (La.) 70; Nott v. Douming, 6 La. 684, 26 Am. Dec. 491; Poignand v. Livermore, 5 Mart. (N. S.) (La.) 324; Walker v. McMicken, 9 Mart. (O. S.) (La.) 192; Lumbermen's Bank v. Pratt, 51 Maine 563; Parker v. Macomber, 18 Pick. (Mass.) 505; McDaniel v. Wood, 7 Mo. 543; Fellows v. Wyman, 33 N. H. 351; Sanford v. Mickles, 4 Johns. (N. Y.) 224; Rice v. Goodenow, Tapp. (Ohio) 94; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Dickerson v. Wheeler, 1 Humph. (Tenn.) 51; Tarver v. Evansville Furniture Co., 20 Tex. Civ. App. 66, 48 S. W. 199; Woodson v. Wood, 84 Va. 478, 5 S. E. 277; Abel v. Sutton, 3 Esp. 108, 6 Rev. Rep. 818; Kilgour v. Finlyson, 1 H. Bl. 155.

[77] Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40; Ewing v. Trippe, 73 Ga. 776; Holtgreve v. Wintker, 85 Ill. 470; Stall v. Cassady, 57 Ind. 284; Merrit v. Pollys, 16 B. Mon. (Ky.) 355; Goddard v. Pratt, 16 Pick. (Mass.) 412; Wagner v. Freschl, 56 N. H. 495; Buffalo City Bank v. Howard, 35 N. Y. 500; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Hammond v. Aiken, 3 Rich. Eq. (S. Car.) 119; Davis v. Willis, 47 Tex. 154; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760. Compare Gale v. Miller, 54 N. Y. 536; Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573; Parker v. Southern Ruralist Co. (Ga. App.), 83 S. E. 158; Horton v. Smith, 12 Ga. App. 232, 77 S. E. 9.

name, to allow a retired member to escape liability from its payment would be to allow the perpetration of a fraud. * * * Until notice of the dissolution of a firm is given, the public, who has no such knowledge, may treat the firm as in existence, and a note given by one member of such firm is binding upon all the other members, notwithstanding such dissolution."[78] So where, after the dissolution of a partnership, a note is given by one of the members in the firm name in payment of a firm debt to one who has had no notice of the dissolution, the firm will be held liable thereon.[79] But there can, it seems, be no recovery against a firm on a note given by one of the partners in the firm name after dissolution where the payee knew that it was given for the pratner's private debt, and also knew or, what amounts to the same thing, was chargeable with notice of the dissolution.[80]

§ 605. Authorization of giving of negotiable paper.—Authority to bind the firm by issuing or indorsing negotiable paper after dissolution may be given by the other partners, either before or after dissolution.[81] It is generally held such authority must

[78] Ewing v. Trippe, 73 Ga. 776.

[79] Long v. Garnett, 59 Tex. 229; Bluff City Lumber Co. v. Bank of Clarksville, 95 Ark. 1, 128 S. W. 58; Burr v. Williams, 20 Ark. 171; Burson v. Stone, 135 Ga. 115, 68 S. E. 1038; Mims v. Brook, 3 Ga. App. 247, 59 S. E. 711; Hicks v. Russell, 72 Ill. 230; Jansen v. Grimshaw, 26 Ill. App. 287 (affd. 125 Ill. 468, 17 N. E. 850); Iddings v. Pierson, 100 Ind. 418; Buchanan v. Buckler, 8 Ky. L. (abstract) 617; Nott v. Douming, 6 La. 684, 26 Am. Dec. 491; Lowe v. Penny, 7 La. Ann. 356; Taylor v. Hill, 36 Md. 494; Whitman v. Leonard, 3 Pick. (Mass.) 177; Pitcher v. Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Pecker v. Hall, 14 Allen (Mass.) 532; Hall v. Heck, 92 Mich. 458, 52 N. W. 749; Seufert v. Gile, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580; Holt v. Simmons, 16 Mo. App. 97; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; Bristol v. Sprague, 8 Wend. (N. Y.) 423; Johanning v. Wilson, 86 N. Y. S. 7; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Anderson v. Weston, 6 Bing. N. Cas. 296, 4 Jur. 105, 9 L. J. C. P. 194, 8 Scott 583; Lamb v. Singleton, 2 Brev. (S. Car.) 490; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760.

[80] Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

[81] Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Burr v. Williams, 20 Ark. 171; New Haven County Bank v. Mitchell, 15 Conn. 206; Bank of Montreal v. Page, 98 Ill. 109;

be express,[82] although it has also been held that it may be inferred from circumstances.[83] General authority to a partner to settle or liquidate firm affairs after dissolution does not give him power to issue or renew notes and bind the firm.[84] The con-

Hamilton v. Seaman, 1 Ind. 185, Smith 129; Conklin v. Ogborn, 7 Ind. 553; Van Valkenburg v. Bradley, 14 Iowa 108; Carr v. Woods, 11 Rob. (La.) 95; Johnson v. Marsh, 2 La. Ann. 772; Lowe v. Penny, 7 La. Ann. 356; Durkee v. Price, 11 La. Ann. 333; Meyer v. Atkins, 29 La. Ann. 586; Rudy v. Harding, 6 Rob. (La.) 70; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Eaton v. Taylor, 10 Mass. 54; First Commercial Bank v. Talbert, 103 Mich. 625, 61 N. W. 888, 50 Am. St. 385; Richardson v. Moies, 31 Mo. 430; Long v. Story, 10 Mo. 636; Williston v. Camp, 9 Mont. 88, 22 Pac. 501; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; National Bank v. Norton, 1 Hill (N. Y.) 572; Lusk v. Smith, 8 Barb. (N. Y.) 570, 4 How. Pr. 418; Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271; Haven v. Goodel, 1 Disney (Ohio) 26, 12 Ohio Dec. 465; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Myers v. Huggins, 1 Strob. (S. Car.) 473; Martin v. Kirk, 2 Humph. (Tenn.) 529; Fowler v. Richardson, 3 Sneed (Tenn.) 508; McElroy v. Melear, 7 Coldw. (Tenn.) 140; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Brown v. Chancellor, 61 Tex. 437; Douglass v. Hall, 22 Vt. 451.

[82] Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Burr v. Williams, 20 Ark. 171; New Haven County Bank v. Mitchell, 15 Conn. 206; Rudy v. Harding, 6 Rob. (La.) 70; Carr v. Woods, 11 Rob. (La.) 95; Johnson v. Marsh, 2 La. Ann. 772; Lowe v. Penny, 7 La. Ann. 356; Durkee v. Price, 11 La. Ann. 333; Meyer v. Atkins, 29 La. Ann. 586; Long v. Story, 10 Mo. 636; National Bank v. Norton, 1 Hill (N. Y.) 572.

[83] Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471.

[84] Lockwood v. Comstock, 4 McLean (U. S.) 383, Fed. Cas. No. 8449; Hamilton v. Seaman, 1 Ind. 185, Smith 129; Van Valkenburg v. Bradley, 14 Iowa 108 (overruling Kemp v. Coffin, 3 G. Greene (Iowa) 190); Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Hatton v. Stewart, 2 Lea (Tenn.) 233; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Brown v. Chancellor, 61 Tex. 437. See also Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Myatts v. Bell, 41 Ala. 222; Conklin v. Ogborn, 7 Ind. 553; Bank of Montreal v. Page, 98 Ill. 109; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Long v. Story, 10 Mo. 636; Lusk v. Smith, 8 Barb. (N. Y.) 570, 4 How. Pr. 418; Galliott v. Planters Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; McElroy v. Melear, 7 Coldw. (Tenn.) 140; Fowler v. Richardson, 3 Sneed (Tenn.) 508; Martin v. Kirk, 2 Humph. (Tenn.) 529; Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388. "The third and last contention of the learned counsel for the bank is that, conceding that the firm was dissolved, and that the bank knew it, the note was still good, because

trary rule, however, has been asserted in Pennsylvania.[85] In a Wisconsin case where one partner retired from the firm and notified the plaintiff bank not to loan any more money to the partnership, according to their regular method of doing business the obligations incurred between November 15 and December 1 were paid by check on December 15, and the remaining partner issued firm checks for firm obligations between December 1 and December 15, which would have overdrawn the account if he had not borrowed $400 from the bank on a note given in the firm name, and it was held the retiring partner was liable on this note, for the reason that since he acquiesced in the liquidation by his copartner, and was liable on the indebtedness for which the checks were drawn by his partner, therefore, the recovery on the note was substantially on the original indebtedness, and the partner was not harmed by a recovery nominally on the note.[86] This case in its holding approximates the old Pennsylvania rule. The giving or indorsing of negotiable paper in the firm name by a partner after dissolution may be ratified by the other partners.[87]

Blanks was authorized to make it in his capacity as liquidator. We think not. He had no other authority, as liquidator, than such as was conferred on him, expressly or impliedly, by his copartners, and that did not include the authority to bind them by the giving of a note." Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255. See also Houser v. Irvine, 3 Watts & S. (Pa.) 345, 38 Am. Dec. 768. Contra: Meyran v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. 806.

[85] Meyran v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. 806; Siegfried v. Ludwig, 102 Pa. St. 547; Lloyd v. Thomas, 79 Pa. St. 68; Ward v. Tyler, 52 Pa. St. 393; Robinson v. Taylor, 4 Pa. St. 242; Petrikin v. Collier, 1 Pa. St. 247; Houser v. Irvine, 3 Watts & S. (Pa.) 345, 38 Am. Dec. 768; In re Davis' Estate, 5 Whart. (Pa.) 530, 34 Am. Dec. 574.

[86] Antigo v. Larsen (Wis.), 132 N. W. 610.

[87] Silas v. Adams, 92 Ga. 350, 17 S. E. 280; Easter v. Farmers' Nat. Bank, 57 Ill. 215; Whitworth v. Ballard, 56 Ind. 279; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241. See also Draper v. Bissel, 3 McLean (U. S.) 275, Fed. Cas. No. 4068; Sanborn v. Stark, 31 Fed. 18; Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Roberts v. Barrow, 53 Ga. 314; Chamberlain v. Stone, 24 Ga. 310; Carter v. Pomeroy, 30 Ind. 438; Conklin v. Ogborn, 7 Ind. 553; Van Valkenburg v. Bradley, 14 Iowa 108 (overruling Kemp v. Coffin, 3 G. Greene (Iowa) 190); Fowle v. Harrington, 1 Cush. (Mass.) 146; Eaton v. Taylor, 10 Mass. 54; Randolph

Such ratification may take place by consenting to the note,[88] either at the time of its execution,[89] or afterward,[90] by an express promise to pay it,[91] by an express adoption of the note,[92] or by making a payment on it,[93] but not by mere recognition of the debt.[94] It is often held that a partner after dissolution may indorse firm paper without recourse, in selling it as part of the firm property.[95]

§ 606. Note given after dissolution as discharge of debt. —Notes given in the firm name after dissolution, in the absence of agreement, do not discharge the original debt.[96] The same rule applies to the note of one partner taken after dissolution of the firm, and neither the original debt nor the liability of the maker of the note on such debt is discharged by the note, in the absence of agreement.[97] Unless there is an agreement to that

v. Peck, 1 Hun (N. Y.) 138; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Hatton v. Stewart, 2 Lea (Tenn.) 233; McElroy v. Melear, 7 Coldw. (Tenn.) 140.

[88] Sanborn v. Stark, 31 Fed. 18; Randolph v. Peck, 1 Hun (N. Y.) 138.

[89] Brown v. Bamberger, 110 Ala. 342, 20 So. 114.

[90] Silas v. Adams, 92 Ga. 350, 17 S. E. 280.

[91] Chamberlain v. Stone, 24 Ga. 310; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Waite v. Foster, 33 Maine 424.

[92] Carter v. Pomeroy, 30 Ind. 438; Whitworth v. Ballard, 56 Ind. 279.

[93] Eaton v. Taylor, 10 Mass. 54.

[94] Conklin v. Ogborn, 7 Ind. 553.

[95] Milliken v. Loring, 37 Maine 408; Temple v. Seaver, 11 Cush. (Mass.) 314; Parker v. Macomber, 18 Pick. (Mass.) 505; Lewis v. Reilly, 1 Q. B. 349.

[96] First Nat. Bank v. Newton, 10 Colo. 161, 14 Pac. 428; Rayburn v. Day, 27 Ill. 46; McConnell v. Stettinius, 7 Ill. 707; Turnbow v. Broach, 75 Ky. 455; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Parham Sewing Machine Co. v. Brock, 113 Mass. 194; Goodspeed v. South Bend Chilled Plow Co., 45 Mich. 237, 7 N. W. 810; Vernam v. Harris, 1 Hun (N. Y.) 451, 3 Thomp. & C. 483; Gardner v. Conn, 34 Ohio St. 187; Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388.

[97] Anderson v. Henshaw, 2 Day (Conn.) 272; Leabo v. Goode, 67 Mo. 126; Powell v. Blow, 34 Mo. 485; Yarnell v. Anderson, 14 Mo. 619; Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390; Smith v. Rogers, 17 Johns. (N. Y.) 340; Herring v. Sanger, 3 Johns. Cas. (N. Y.) 71; Waydell v. Luer, 3 Denio (N. Y.) 410; Ludington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601 (revg. 11 Jones & S. 557); First Nat. Bank v. Green, 40 Ohio St. 431; Keating v. Sherlock, 13 Ohio Dec. 536, 1 Cin. S. Ct. 257; Kean v. Dufresne, 3 Serg. & R. (Pa.)

effect, the note of a surviving partner does not discharge a firm debt.[98] And a note of one partner or in the firm name taken without knowledge of the dissolution of a partnership, will not discharge the original debt.[99]

§ 607. Liquidating partner.—The inherent general agency of a member of a going partnership[1] becomes in a liquidating, as in a surviving partner,[2] a limited and restricted one,[3] an express delegation being necessary in order that he may possess authority in excess of that commonly reposing in each of the one-time

233; Mason v. Wickersham, 4 Watts & S. (Pa.) 100; In re Davis' Estat 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Nightingale v. Chafee, 11 R. I. 609, 23 Am. Rep. 531; White v. Boone, 71 Tex. 712, 12 S. W. 51; Seward v. L'Estrange, 36 Tex. 295; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Rosseau v Cull, 14 Vt. 83; Evans v. Drummond, 4 Esp. 89; Thompson v. Percival, 5 Barn. & Ad. 925, 3 Nev. & M. 167, 3 L. J. K. B. (N. S.) 98, 19 Eng. Rul. Cas. 728; Bedford v. Deakin, 2 Barn. & Ald. 210, 2 Starkie 178.

[98] In re Clap, 2 Lowell (U. S.) 226, Fed. Cas. No. 2784; Thompson v. Briggs, 28 N. H. 40; Titus v. Todd, 25 N. J. Eq. 458; National Bank v. Bigler, 83 N. Y. 51; Mebane v. Spencer, 28 N. Car. 423; Leach v. Church, 15 Ohio St. 169; Collier v. Leech, 29 Pa. St. 404.

[99] Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501; Adler v. Foster, 39 Mich. 87; Hill v. Marcy, 49 N. H. 265; Fry v. Patterson, 49 N. J. L. 612, 10 Atl. 390; Heroy v. Van Pelt, 4 Bosw. (N. Y.) 60; First Nat. Bank v. Morgan, 73 N. Y. 593; Wait v. Brewster, 31 Vt. 516. See also Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317.

[1] See ante § 411 et seq.

[2] See post ch. 20.

[3] "The dissolution having been by agreement, and the appellant being in possession of the assets for the purpose of realizing upon them, discharging liabilities and distributing surplus, he has the same right as, and occupies a position analogous to that of, a surviving partner." Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327. "The duty imposed upon the liquidator is one of agency. He becomes the sole authorized agent of the partnership for the single purpose of winding up and finally settling its affairs. There are elements of trust in his position and duty which lead so often to regard and describe him as a trustee for the creditors on the one hand or the retiring partner on the other, and the description is not inappropriate so long as it does not mislead us into the error of regarding the position and duty of the liquidator as that belonging to a direct trust. His authority is not such. No new authority is given to him. What he has is a restricted and narrowed part of that which the partnership conferred. That continues and subsists to the extent necessary for a settlement of the business, and is not a new authority or a direct trust.

partners.[4] Moreover, the appointment of a member of the dissolved firm to liquidate its affairs does not, it seems, in the absence of notice, affect the power of his former associates to bind

Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; Adams v. Taylor, 14 Ark. 62. The liquidator becomes the agent for the partnership for the one specific purpose. His duty is to collect and adjust the debts due to the firm, to turn the assets into money, to pay and discharge the outstanding liabilities, and then to pay over to the other partner his just share of the remaining surplus." Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554.

[4] "Appended to the notice of dissolution signed by the partners, and published in this case, is this clause: 'The remaining unsettled business of the firm will be adjusted by E. Short, who is hereby authorized to close all business transactions of the late firm.' This notice is good evidence of the agreement of the parties, and conclusive in favor of third persons who have dealt with Short, relying upon it. But no one could or had a right to understand it as authorizing Short to do more than to adjust and settle the unfinished business, and close up the transactions of the firm. This power he had without the agreement; it added nothing to the authority which the law gave, and took nothing from it. * * * There is not a word in it to indicate an intention to confer upon him the authority to create new obligations. He is therefore remitted to his power as a partner, and, considered in that light, it is very clear he possessed no such authority. The elementary books and adjudged cases speak an almost uniform language upon the subject." Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271. See further Myatts v. Bell, 41 Ala. 222; Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Joselove v. Bohrman, 119 Ga. 204, 45 S. E. 982; Bank of Montreal v. Page, 98 Ill. 109; Hamilton v. Seaman, 1 Ind. 185, Smith 129; Van Valkenburg v. Bradley, 14 Iowa 108; Parker v. Macomber, 18 Pick. (Mass.) 505; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485; Hilton v. Vanderbilt, 82 N. Y. 591; Stirnermaun v. Cowing, 7 Johns. Ch. (N. Y.) 275; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554; Smith v. Proskey, 82 App. Div. 19, 81 N. Y. S. 424 (revd. 177 N. Y. 526, 69 N. E. 1131); Mauney v. Coit, 80 N. Car. 300, 30 Am. Rep. 80; Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388; Conrad v. Buck, 21 W. Va. 396. And compare Star Wagon Co. v. Swezey, 52 Iowa 391, 3 N. W. 421, 59 Iowa 609, 13 N. W. 749; Waite v. Foster, 33 Maine 424; Casco Bank v. Hills, 16 Maine 155; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190; Napier v. McLeod, 9 Wend. (N. Y.) 120; In re Davis' Estate, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Whitehead v. Bank of Pittsburgh, 2 W. & S. (Pa.) 172; Jack v. McLannahan, 191 Pa. St. 631, 43 Atl. 356; Meyran v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. 806; Siegfried v. Ludwig, 102 Pa. St. 547; Fulton v. Central Bank, 92 Pa. St. 112; Lloyd v. Thomas, 79 Pa. St. 68;

the partnership.[5] Interest and profits are not, apparently, assessable against a liquidating partner to any further extent than in the case of a surviving one.[6]

§ 608. Holding out as partner after dissolution.—Although a partner has retired from the firm he is not relieved from liability as a partner until he has given proper notice, and this liability is sometimes said to arise from his holding himself out as a partner.[7] Even after giving notice a partner may by his conduct cause others to believe that he is liable as a partner and will be held bound to persons who have relied on such apparent liability in giving credit,[8] as by permitting the use of the old firm name.[9] In such cases it is a question of fact whether there was a holding out as a partner.[10]

McCowin v. Cubbison, 72 Pa. St. 358; McCoon v. Galbraith, 29 Pa. St. 293; Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Pa. St. 242; Dundass v. Gallagher, 4 Pa. St. 205; Houser v. Irvine, 3 Watts & S. (Pa.) 345, 38 Am. Dec. 768.

[5] Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376; Clark v. Reed, 31 Leg. Int. (Pa.) 413. See further Casco Bank v. Hills, 16 Maine 155.

[6] Buckley v. Kelly, 70 Conn. 411, 39 Atl. 601; Randolph v. Inman, 172 Ill. 575, 50 N. E. 104; Macready v. Schenck, 43 La. Ann. 479, 9 So. 470; Dunlap v. Watson, 124 Mass. 305; Fithian v. Jones, 12 Phila. (Pa.) 201; In re Brown's Appeal, 89 Pa. St. 139. See further Klotz v. Macready, 39 La. Ann. 638, 2 So. 203.

[7] Richards v. Hunt, 65 Ga. 342; In re Morse, Fed. Cas. No. 9854; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495; Stall v. Cassady, 57 Ind. 284; Spears v. Toland, 1 A. K. Marsh. (Ky.) 203, 10 Am. Dec. 722; Goddard v. Pratt, 16 Pick. (Mass.) 412; Morrill v. Bissell, 99 Mich. 409, 58 N. W. 324; Curtis v. Sexton, 201 Mo. 217, 100 S. W. 17; Thatcher v. Allen, 58 N. J. L. 240, 33 Atl. 284; Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946; Davis v. Willis, 47 Tex. 154; Amidown v. Osgood, 24 Vt. 278, 58 Am. Dec. 171.

[8] Gammon v. Huse, 100 Ill. 234; Shapard Grocery Co. v. Hynes, 3 Ind. Ter. 74, 53 S. W. 486; Casco Bank v. Hills, 16 Maine 155; Garbett v. Gedney, 15 Misc. 440, 37 N. Y. S. 200, 72 N. Y. St. 780; Metz v. Commercial Bank, 45 S. Car. 216, 23 S. E. 13; Wait v. Brewster, 31 Vt. 516; Farmers' Bank v. Smith, 26 W. Va. 541; Wausan First Nat. Bank v. Conway, 67 Wis. 210, 30 N. W. 215; Ex parte Cooper, 5 Jur. 10.

[9] Dreher v. Connolly, 9 N. Y. S. 365, 16 Daly 106, 30 N. Y. St. 674; Norquist v. Dalton, 11 N. Y. S. 351, 32 N. Y. St. 240; Speer v. Bishop, 24 Ohio St. 598.

[10] Boyd v. McCann, 10 Md. 118; Reed v. Frazer, 37 Minn. 473, 37 N. W. 269; Barkley v. Beckwith, 90 App. Div. 570, 86 N. Y. S. 128; Cook v. Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568.

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